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Case No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ARNOLD JAGO, Superintendent
Southern Ohio Correctional Facility,

Petitioner,

vs.

ROBERT LONBERGER.

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

WILLIAM J. BROWN
Attorney General of Ohio

RICHARD DAVID DRAKE
Counsel of Record
Assistant Attorney General

State Office Tower
30 East Broad Street, 26th Floor
Columbus, Ohio 43215
(614) 466-5414

Attorneys for Petitioner

QUESTION PRESENTED

WHETHER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT REQUIRES THE VACATION OF A STATE COURT MURDER CONVICTION WHERE: A GUILTY PLEA, SUBSEQUENTLY FOUND TO BE INVALID FOR PROCEDURAL FAILURE OF THE RECORD, IS ADMITTED INTO EVIDENCE FOR THE SOLE PURPOSE OF PROVING A DEATH PENALTY ENHANCING SPECIFICATION; THE STATE COURT JURY WAS EXPRESSLY INSTRUCTED THAT THE PRIOR GUILTY PLEA WAS NOT TO BE CONSIDERED FOR THE PURPOSE OF PROVING THE SUBSTANTIVE OFFENSE; THE SUBSTANTIVE OFFENSE WAS VACATED AND MODIFIED UPON APPELLATE REVIEW IN THE STATE COURTS FOR UNRELATED REASONS TO A LESSER CONVICTION NOT INVOLVING THE POTENTIAL OF THE DEATH PENALTY; AND WHERE EVIDENCE OF THE FEDERAL HABEAS CORPUS APPLICANT'S GUILT TO THE MODIFIED SUBSTANTIVE OFFENSE IS OVERWHELMING.

PARTIES

The petitioner in this action is Arnold Jago in his former capacity as Superintendent of the Southern Ohio Correctional Facility at Lucasville, Ohio. The respondent is Robert Lonberger.

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DECISIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit and order denying rehearing are, as of yet, unreported. **Lonberger v. Jago,** _____F.2d_____(6th Cir. 1980) (A-1 , A-13). The decision of the United States District Court for the Northern District of Ohio, Western Division is unreported. (A-16). The decision of the Ohio Court of Appeals for the Sixth Judicial District is unreported (A-31).

JURISDICTION

The decision of the United States Court of Appeals for the Sixth Circuit was entered on December 1, 1980. Rehearing was denied on December 30, 1980. Jurisdiction is conferred by 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The case involves Section 1 of Amendment XIV to the Constitution of the United States:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

ARNOLD JAGO, Superintendent
Southern Ohio Correctional Facility,

Petitioner,

vs.

ROBERT LONBERGER.

Respondent.

STATEMENT OF THE CASE

Respondent Robert Lonberger was indicted by the January, 1975 Term of the Lucas County, Ohio, Grand Jury on two (2) counts for the crime aggravated murder. Count two (2) of the indictment[1] charged respondent with a violation of Ohio Revised Code Section 2903.01(B) which provides in pertinent part:

> No person whall purposely cause the death of another while committing or attempting to commit. . .rape

Under the then prevailing Ohio procedure,[2] imposition of the death penalty for aggravated murder was precluded unless a death penalty "specification" of an aggravating circumstance was separately alleged and proved beyond a reasonable doubt by the prosecution. *See* Ohio Revised Code Section 2929.03. The enumerated death penalty specifications were listed in Ohio Revised Code Section 2929.04. In addition to the principal change of aggravated murder, the Grand Jury indicted respondent pursuant to the specification in Ohio Revised Code Section 2929.04(A)(5) which provided in pertinent part:

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1. No verdict was returned with respect to count one (1). Thus, only count two (2) is in issue.

2. In **Lockett v. Ohio**, 438 U.S. 586 (1978) and **Bell v. Ohio**, 438 U.S. 637 (1978), this Court held Ohio's former death penalty mechanism unconstitutional on the ground that it unduly restricted the range of "mitigating circumstances" which a convicted murderer might interpose in order to escape execution. However, neither those rulings nor their underlying analysis are pertinent to the nerein action.

> The offender has previously been convicted of an offense of which the gist was the purposeful killing of or attempt to kill another. . .

In order to establish the underlying charge of aggravated murder, the State presented evidence which established that the victim Charita Lanier was murdered in her home at approximately 10:00 p.m. on the evening of January 29, 1975. The murder was particularly brutal and death resulted from exsanguination as a result of a slashed throat. A blood-stained and bent twelve-inch knife was found at the scene and identified as the murder weapon. Blood stains indicated that Ms. Lanier was knifed in her living room and that her body was dragged to the kitchen, where it was found, only partially clothed, in a freezer. The victim's young sons, Hillary and Kazedore Lanier, identified respondent and testified that respondent was at their mother's home on the evening of the murder. The children were upstairs in their bedroom while respondent and their mother were together downstairs. Hillary testified that he heard his mother scream. Kazedore testified that he thereafter went downstairs to the kitchen and found that all the lights were off. Respondent then refused to allow him to turn the lights on and ordered him to go back to bed.

In addition to this direct and forensic evidence, the State further established that a cigarette pack of respondent's brand was found in the house. Finally, the State introduced respondent's blood-stained clothing into evidence.

The only evidence indicating that the victim had been raped consisted of autopsy results which revealed the presence of sperm in her vaginal canal.[3]

It was on the basis of the foregoing evidence that the jury returned a verdict of guilty to the substantive crime of aggravated murder.

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3. As will be hereinafter discussed, this wholly circumstantial evidence of rape proved fatal to the prosecution's rape-murder conviction as a matter of state law.

In order to prove the separate and distinct question of respondent's guilt as to the death penalty specification, the prosecution presented evidence pursuant to Ohio Revised Code Section 2945.75(B) which provides:

> Whenever in any case it is necessary to prove a prior conviction, a certified copy of the entry of judgment in such prior conviction together with evidence sufficient to identify the defendant named in the entry as the offender in the case at bar, is sufficient to prove such prior conviction.

In accord with said state statute, the prosecution offered a journal entry of conviction which established that respondent had entered a plea of guilty to the crime of attempted murder before the Circuit Court of Cook County, Illinois, in 1972.

Respondent filed a pre-trial motion to dismiss the death penalty specification alleging that the 1972 Illinois guilty plea was invalid for the reason that it was not knowingly and voluntarily entered. Pursuant to said motion, the Common Pleas Court conducted a full evidentiary hearing.

During the evidentiary hearing, the State presented the certified transcript of proceedings of respondent's 1972 Illinois guilty plea. The record reflected that respondent had been indicted by the May 1971 Term of the Cook County Illinois, Grand Jury on one (1) count for the crime of aggravated battery [causing great bodily harm] in violation of Chapter 38, Section 12-4 of the Amended Illinois Revised Statutes, on two (2) counts for the crime of aggravated battery [using a deadly weapon] in violation of Chapter 38, Section 12-4(b-1) of the Amended Illinois Revised Statutes, and on one (1) count for the crime of attempt [to kill by cutting] in violation of Chapter 38, Section 8-4 of the Illinois Revised Statutes. The record established that on June 7, 1971, respondent appeared before the Illinois Court for the purpose of arraignment and entered pleas of not guilty while represented by counsel. The record further established that respondent remained incarcerated and subsequently obtained alternate counsel.

On March 10, 1972, respondent and his attorney appeared before the Illinois Circuit Court for the purpose of trial. At the outset of the proceedings, respondent's attorney informed the Court that a proposed plea bargain agreement had been reached

and requested a conference in order to obtain the Court's approval. Thereupon, the following colloquy was had between the Court and respondent:

> THE COURT: Do you know what a conference is? That means the State's Attorney, your counsel and myself will sit down and discuss certain things about your case. Thereafter, if everything is acceptable to all, a possible plea and disposition by way of guilty.
>
> Understand that, sir:
>
> THE DEFENDANT: Understand.
>
> THE COURT: Knowing all this, and I am going to find out certain things about the case, as well as certain things about you I would not ordinarily find out at this time, knowing all this information, do you wish for us to have a conference?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Understand after the conference, despite the fact I have this information, you will not be entitled to a substitution of Judges?
>
> Understand that, since you agreed to the conference:
>
> THE DEFENDANT: Yes.

At the conclusion of the in chambers conference, respondent and his attorney conferred and the following exchange occurred:

> MR. XINOS: [Defence Counsel] Mr. Lonberger is before the Court and desires to change his previously entered plea of not guilty to that of guilty.
>
> Ready to proceed.
>
> THE COURT: Is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: In other words, you are pleading guilty, that you did on August 25, 1968, commit the offense of aggravated battery on one Dorothy Maxwell, and that you did on the same date attempt on Dorothy Maxwell, with a knife, is that correct:

THE DEFENDANT: Yes, sir.

THE COURT: And you did on the same date commit the offense of aggravated battery on one Wendtian Maxwell, is that correct?

That is what you are pleading to, sir?

THE DEFENDANT: Yes, sir.

After advising respondent of those rights which he was waiving by pleading guilty, the Illinois Court further advised respondent of the respective penalties for aggravated battery and attempt as follows:

THE COURT: Understand by pleading guilty I could sentence you from one to ten on the aggravated battery, and attempt one to twenty. So, I could sentence you to the penitentiary for a maximum of from one to forty years.

Understand that?

THE DEFENDANT: Yes, sir.

Respondent then assured the Court that no threats or promises had been made except that he would be sentenced to a term of from two (2) to four (4) years imprisonment. Respondent, through counsel, then stipulated that the indictment "is both sufficient in law and in fact to sustain the charges contained therein, to sustain a finding of guilty on the charges. . ."

Respondent chose to testify in his own behalf during the Ohio pre-trial evidentiary hearing. Respondent testified that he had been incarcerated for a period of thirteen (13) months prior

to the entry of his Illinois guilty plea and, that during this extended period, he had neither been served with a copy of the indictment nor had either of this two (2) attorneys informed him that one of the counts charged him with attempt [to kill by cutting]. Respondent further testified that, despite the Illinois Court's express statement regarding the crime of attempt and subsequent explanation of its attendant penalty, he subjectively believed that he was only "copping out to aggravated battery." Respondent conceded that he was a seasoned veteran of both the criminal court system and the Illinois penal institutions, but professed ignorance of the 1972 proceeding on the basis that Chicago tribunals were "Kangaroo Courts."

The Ohio trial court personally questioned respondent and it was developed that he was both educated, articulate, and remarkably conversant with criminal procedure. At the conclusion of the evidentiary hearing, the Ohio trial court found that respondent's 1972 Illinois guilty plea had been entered voluntarily and with an understanding of the charges against him.

During the course of respondent's trial, a certified copy of the Illinois entry of judgment for the crime of attempt [to kill by cutting] was admitted into evidence. The jury found respondent guilty of the specification and respondent was sentenced to death by electrocution.[4]

Respondent appealed his conviction and sentence to the Court of Appeals for the Sixth Judicial District. On April 22, 1977, the state appellate court issued a comprehensive opinion. (A-31) Relying upon this Court's decision in **Spencer v. Texas**, 385 U.S. 554 (1967), the Court of Appeals held that admission of evidence regarding respondent's prior attempted murder did not constitute a violation of the Due Process Clause of the Fourteenth Amendment. Specifically, the Court found that the following admonition given to the jury by the trial court was in accord with **Spencer** dictates and preempted any concerns that the jury would consider the prior Illinois conviction as evidence of guilt with respect to the crime of aggravated murder:

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4. During trial, respondent offered to *stipulate* to his prior conviction for attempted murder but said stipulation was refused by the prosecution.

> Now, the evidence presented to your concerning a prior conviction of this Defendant, Robert Lonberger, for the offense of attempted murder in Illinois in 1968 is not introduced for the purpose of proving that the Defendant committed the offenses, or either of them, for which he is being tried this week. This evidence was presented to prove the first specification of the first count of the indictment and the first specification of the second count of the indictment as required by law.
>
> It is the responsibility of the jury to make a finding of guilty or not guilty of each of these specifications attached to any count of the indictment upon which you find the Defendant guilty, if you do, in fact, find him guilty of either of the principal charges. These specifications must be proved to you beyond a reasonable doubt.
>
> The only way a jury can determine whether or not the Defendant was previously convicted of the offense of attempted murder as charged by the State in the two specifications previously referred to is to hear and consider evidence tending to prove such a conviction. Thus, this evidence of a prior conviction was presented only for the purpose of proving the prior conviction. This is the only purpose for which you may consider it.
>
> You may not consider it for the purpose of proving, in any way, that the Defendant committed the offenses for which he is being tried today. [Trial Transcript pages 1178-1180].

However, the Court of Appeals went on to hold that the State's proof of guilt with respect to rape was entirely circumstantial and thus, as a matter of Ohio law, was subject to the requirement that it be wholly inconsistent with any reasonable conslusion other than the defendant's guilt. *See* **State v. Kulig,** 37 Ohio St. 2d 157 (1974). The Court held that while

the prosecution had established that the victim had engaged in sexual intercourse, that fact was not wholly inconsistent with a theory of voluntary sexual relations and thus precluded a finding of forcible rape. Accordingly, the Court ordered "that the judgment on the verdict of guilty of aggravated murder in violation of R.C. 2903.01(B) be and hereby is reversed, and that a final judgment of guilty of murder in violation of R.C. 2903.02 be and hereby is entered."

Cross motions for leave to appeal were thereafter dismissed by the Supreme Court of Ohio for want of a substantial constitutional question. In accord with the state appellate court mandate, respondent thus stood convicted of the lesser offense of "having purposely caused the death of another" and was resentenced to a term of from fifteen (15) years to life imprisonment.

Respondent subsequently filed a petition for writ of habeas corpus pursuant to 28 U.S.C. Section 2254 with the United States District Court for the Northern District of Ohio, Western Division. The district court examined the state court record of proceedings and determined that "[f]rom a review of the record, this Court is satisfied that an ordinary person would have understood the nature of the charges to which petitioner was pleading guilty." (A-24). The district court held that the guilty plea satisfied the requirements of Illinois procedure as set forth in Illinois Ann. Stat. ch. 110A Section 402 and construed in **People v. Cook**, 26 Ill. App. 3d 44, 324 N.E. 2d 432 (1975). The district court held that the record demonstrated that respondent's guilty plea was voluntarily and intelligently entered in accord with constitutional dictates in that respondent understood both the nature of the offenses to which he pleaded guilty and their attendent penalties. **Boykin v. Alabama**, 395 U.S. 238 (1969). Relying upon this Court's decision in **Spencer v. Texas**, *supra.*, the district court held that use of the Illinois conviction during respondent's Ohio trial did not offend the provisions of the Due Process Clause. (A-21). Respondent filed a notice of appeal and was granted a certificate of probable cause.

The United States Court of Appeals for the Sixth Circuit reversed the lower court judgment and remanded to the district court for issuance of the writ of habeas corpus. **Lonberger v.**

Jago, _____F. 2d_____(6th Cir. 1980) (A- 1). The Court of Appeals found the transcript of respondent's 1972 Illinois guilty plea "on its face . . . inadequate to show that the defendant understood the charge to which he was pleading." (A-11). Specifically, the appellate court held that the Illinois trial court's use of the term "attempt" without adding the phrase "to kill by stabbing" deprived respondent of "real notice of the true charges against him." **Henderson v. Morgan,** 426 U.S. 637 (1976). While noting that the fact of respondent's Illinois conviction was used only with respect to respondent's previously vacated death sentence and that a **Spencer v. Texas,** *supra.* limiting instruction had been given to the jury, the circuit court reasoned that **Burgett v. Texas,** 389 U.S. 109 (1967). required that respondent's murder conviction be vacated.

Petitioner thereafter filed a petition for rehearing. Petitioner noted that the Court of Appeals had, in the first instance, found respondent's 1972 Illinois guilty plea to be *facially* invalid. However, the circuit court did not, and upon the basis of the record before it, could not make a finding with respect to respondent's *actual knowledge* of the nature of the charges to which he entered his guilty plea. Petitioner further noted that as the district court had found the guilty plea valid on its face, an evidentiary hearing had not been held, but, that given the circuit court's disagreement as to the facial validity of the plea, the proper remedy was a remand to the district court with instructions to conduct an evidentiary hearing wherein both the Illinois trial judge and respondent's Illinois attorney could testify as to explanations made to respondent regarding the attempt to kill by stabbing conviction.[5] Petitioner further argued that the Illinois conviction had only been admitted for the limited purpose of proving the death penalty specification which had earlier been vacated on unrelated grounds by the

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5. In **Roddy v. Black,** 516 F.2d 1380 (6th Cir. 1975), the district court had determined that the habeas corpus applicant's guilty plea was facially invalid. The district court conducted an evidentiary hearing in order to ascertain the petitioner's actual understanding of the charges to which he pleaded guilty. On the basis of this extrinsic evidence, the district court found as a matter of fact that the petitioner actually understood the nature of the offenses to which he pleaded guilty and dismissed the petition. The circuit court affirmed the district judgment. The herein petitioner's petition for rehearing simply requested that the Court of Appeals adher to such procedure and remand for an evidentiary hearing.

Ohio Court of Appeals. As the jury is expected to follow the limiting instructions tendered by the trial court, it was error for the circuit court to simply presume that the jury did not follow the trial court's admonition. **Spencer v. Texas,** *supra* at page 562. Petitioner finally noted that respondent stood convicted of having "purposely caused the death of another" and that the evidence presented overwhelmingly established respondent's guilty.

The Court of Appeals thereafter issued an order denying the petition for rehearing. (A-13).

Petitioner's motion to stay the mandate pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure was granted on January 21, 1981. (A-15). This petition has followed.

ARGUMENT IN SUPPORT OF GRANTING CERTIORARI

The instant case presents an important issue of constitutional law regarding the scope and vitality of this Court's decision in **Spencer v. Texas,** 385 U.S. 554 (1967).

In **Spencer,** this Court held that an accused is not denied his rights as secured by the Due Process Clause of the Fourteenth Amendment when a jury considering a substantive criminal charge is advised of the accused's prior criminal convictions for the sole prupose of sentencing enhancement and the jury is given a limiting instruction which preempts consideration of the prior convictions when deliberating upon the guilt or innocence of the defendant. In rejecting the contention that the use of prior convictions in a current criminal trial of an accused was so egregiously unfair upon the issue of guilt or innocence as to offend the Due Process Clause, the Court stated:

> To say the United States Constitution is infringed simply because this type of evidence may be prejudicial and limiting instructions inadequate to vitiate prejudicial effects, would make inroads into this intire complex code of state criminal evidentiary law, and would threaten other large areas of trial jurisprudence. For example, all joint rials, whether of several codefendants or of one defendant charged with

> multiple offenses, furnish inherent opportunities for unfairness when evidence submitted as to one crime (on which there may be an acquittal) may influence the jury as to a totally different charge.
>
> * * *
>
> This type of prejudicial effect is acknowledged to inhere in criminal practice, but it is justified on the grounds that (1) the jury is expected to follow instructions in limiting this evidence to its proper function, and (2) the convenience of trying different crimes against the same person, and connected crimes against different defendants, in the same trial is a valid governmental interest. *Id.* at page 562.

The Court discounted the petitioner's reliance upon decisions such as **Jackson v. Denno,** 378 U.S. 368 (1964), by distinguishing those claims which arise as a result of a specific constitutional right and those which find support only in the more amporphously grounded due process or general "fairness" approach. Specifically, the Court stated:

> In the procedures before us, in contrast, no specific federal right-such as that dealing with confessions-is involved; reliance is placed solely on a general "fairness" approach. In this area the Court has always moved with caution before striking down state procedures. It would be extravagant in the extreme to take Jackson as evincing a general distrust on the part of the Court of the ability of juries to approach their task responsibly and to sort out discrete issues given to them under proper instructions by the judge in a criminal case, or as standing for the proposition that limiting instructions can never purge the erroneous introductions of evidence or limit evidence to its rightful purpose. *Id.* at page 565.

It was upon the basis of the aforementioned distinction that this Court decided **Burgett v. Texas,** 389 U.S. 109 (1967). Therein, this jury was made aware of the petitioner's prior uncounseled convictions. The Court held that the limiting instruction tendered by the Texas trial court was insufficient to dissipate the inherent prejudice occasioned by the admission of a conviction constitutionally infirm under the express Sixth Amendment guarantee to counsel. The Court expressly distinguished **Spencer** as follows:

> Our decision last Term in Spencer v. Texas, 385 U.S. 554, 17 L ed 2d 606, 87 S. Ct 648, is not relevant to our present problem. In Spencer the prior convictions were not presumptively void. Moreover, the contention was that the guilt phase of the trial was prejudicied by the introduction of the evidence of prior crimes. As the Court noted, "[i]n the procedures before us . . . no specific federal right-such as that dealing with confessions-is involved; reliance is placed solely on a general 'fairness' approach." Id, at 565, 17 L ed 2d at 615. In this case, however, petitioner's right to counsel, a "specific federal right," is being denied anew. This Court cannot permit such a result unless Gideon v. Wainwright is to suffer serious erosion. *Id.* at pages 115-116.

The instant case closely parallels the enhancement procedure employed by the Texas recidivist statute. Respondent was charged with the substantive offense of felony-murder, i.e., murder during the course of a rape. The State presented overwhelming evidence that respondent was the instrumentality of the victim's death and the savage method used to take her life belays any doubt that the killing was purposeful. As a separate and distinct matter, respondent was additionally charged with a death penalty specification which alleged that he had previously been convicted of attempted murder. The trial court was careful to expressly admonish the jurors that evidence of the earlier Illinois conviction was unrelated to the substantive offense charged and could not be used in any manner during the deliberation upon respondent's guilt or innocence of the murder charged.

Unlike the uncounseled convictions which formed the focus of the **Burgett** decision, the 1972 Illinois guilty plea admitted for the limited purpose of proving the aggravating death penalty circumstance cannot be characterized as "presumptively void." Rather, the constitutional integrity of the plea was the subject of a full evidentiary hearing conducted by the state trial court. Subsequent to the hearing, the trial court determined that the factors surrounding the plea, including respondent's intelligence, his prior experience with the criminal justice system, the fact that he had spent thirteen (13) months in jail awaiting trial, the fact that he had been arraigned upon the charges, the fact that he had been represented by two (2) competent and experienced criminal defense attorneys, the express statement of the Illinois trial court, and respondent's assurances to the Illinois court that no promises or inducements had been made except with respect to the sentence which would be imposed, demonstrated that the guilty plea was voluntarily and intelligently entered in accord with the federal strictures enunciated in **Boykin v. Alabama,** 395 U.S. 238 (1969).

The conclusion of the trial court was thereafter subjected to appellate scrutiny by both the state judiciary upon direct appeal and by the federal district court during respondent's collateral challenge by way of 28 U.S.C. Section 2254. The district court similarly concluded that the Illinois guilty plea had been voluntarily and knowingly tendered. Indeed, even the disagreement of the circuit court was predicated upon the very narrow ground that the Illinois court had stated on the record that "you did on the same date attempt on Dorothy Maxwell, with a knife, is that correct?," rather than "you did on the same date attempt [to kill] Dorothy Maxwell, with a knife, is that correct;" It is thus evident that the federal appellate court's finding that respondent did not receive "real notice of the true charges against him" was grounded upon a hyper-technical and erroneous interpretation of this Court's decision in **Henderson v. Morgan,** 426 U.S. 637 (1976).[6]

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6. The extent to which respondent had *actual* notice and understanding of the attempt [to kill by stabbing] charge through communications with his concededly able and experienced attorney is not of record due to the refusal of the circuit court to remand for an evidentiary hearing.

While it is beyond debate that an accused must have notice of the charge against him sufficient to convey a fundamental understanding of the crime to which he enters a guilty plea, this Court has yet to either enunciate or sanction the wholly prophylactic rule fashioned by the circuit court.

Even given that the circuit court's deviation from this Court's prior opinions regarding the requisites of a constitutionally valid guilty plea can withstand scrutiny, the judgment must fail.

Unlike **Burgett**, respondent did not "suffer anew" from the introduction of a "presumptively void" prior conviction obtained in violation of a specific federal right. Rather, respondent has suceeded, years later, in convincing a federal circuit court sitting in a collateral habeas corpus proceeding to adopt a highly prophylactic "on the record" rule with respect to the validity of a guilty plea. This newly fashioned rule goes so far as to prevent a State from defending the integrity of the challenged plea by presentation of evidence which demonstrates that it was entered voluntarily and with a complete understanding of the nature of the offense and its concommittant consequences. The result of the circuit court judgment is to vacate a conviction for murder which is wholly unrelated to the guilty plea determined to be invalid.

The Court of Appeals holding presents a direct and substantial issue of the continuing vitality of this Court's decision in **Spencer v. Texas**, *supra.* In **Spencer**, the Court acknowledged the inherent opportunities for prejudice when the jury is made aware of the prior convictions of an accused. The Court noted that such opportunities for unfairness inhere to "all joint trials, whether of several codefendants or of one defendant charged with multiple offenses" *Id.* at page 562. However, the Court stated that "[i]t would be extravagant in the extreme" to question "the ability of juries to approach their task responsibly and to sort out discrete issues given to them under proper instructions by the judge" or to state "that limiting instructions can never purge the erroneous introduction of evidence or limit its rightful purpose." *Id.* at page 565. The Court properly reasoned that to hold limiting instructions inadequate to vitiate prejudicial effects "would make inroads into this entire complex code of state criminal evidentiary law." *Id.* at page 562.

The demands of the Due Process Clause were considered in a somewhat varied context by this Court in **Murphy v. Florida,** 421 U.S. 794 (1975). Therein, the record reflected that the state court jurors had been exposed to extensive newspaper coverage of the accused who was referred to by the media as "Murph the Surf." The jurors had read various accounts regarding the defendant's "flamboyant lifestyle," and were aware of his prior convictions for a notorious jewel theft and for murder. In affirming Murphy's conviction, this Court held that the constitutional standard of fairness does not require that jurors be totally ignorant of the facts and issue involved but, rather, "it is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Id. at page 800. To like*

evidence presented in court." *Id.* at page 800. To like effect, during the voir dire examination in respondent's state court trial, the jurors assured both the trial court and counsel that they would follow the trial court's instructions and would not consider respondent's prior Illinois conviction as evidence of guilt upon the substantive crime of murder. The holding in **Murphy,** has since been reaffirmed by this Court. *See* **Dobbert v. Florida,** 432 U.S. 282, 303 (1977).

The salient effect of the federal court opinion and order denying rehearing is a declaration that limiting instructions given to a jury are *per se* inadequate to vitiate the possible prejudicial effects which inhere upon reception by the jury of information regarding an accused's prior conviction. Such ruling clearly calls into issue the vitality of this Court's decision in **Spencer v. Texas,** *supra* and, more importantly, its analytical underpinning. A decision by this Court is imperative in order to advise the States of the precise scope of the demands which the Due Process Clause places upon the administration of their criminal justice systems.[7]

The circuit court has invalidated respondent's Ohio murder conviction through an extremely dubious determination that his 1972 Illinois guilty plea was not knowingly and voluntarily entered and despite the fact that such prior conviction is totally unrelated to the crime for which respondent is presently incarcerated. The Ohio jury which convicted respondent of murder assured the trial court that they would consider respondent's guilt or innocence without reference to his prior conviction and

the evidence presented establishes beyond peradventure that respondent is, in fact, guilty of the substantive offense of murder. Indeed, any arguable "error" is clearly subsumed within the ambit of the harmless error doctrine.

As the instant case presents a substantial constitutional question as to the scope and vitality of this Court's decision in **Spencer v. Texas** *supra.* and the impact of that decision upon the orderly administration of the State criminal justice systems, certiorari should be granted in order to resolve this issue of national importance.

Respectfully submitted,

WILLIAM J. BROWN
Attorney General of Ohio

RICHARD DAVID DRAKE
Counsel of Record
Assistant Attorney General

State Office Tower
30 East Broad Street, 26th Floor
Columbus, Ohio 43215
(614) 466-5414

Attorneys for Petitioner

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7. For instance, should this Court affirm the circuit court ruling, many State legislatures might well provide for bifurcated trials in enhanced penalty settings in order to insure the integrity of the substantive crime should, as here, the "aggravating crime" be subsequently invalidated. This is particularly vital in a capital punishment context.

CERTIFICATE OF SERVICE

I hereby certify that the requisite number of copies of the foregoing Petition For Writ Of Certiorari have been served on respondent Robert Lonberger, by forwarding such copies through the office of his counsel, John Czarnecki, 900 Adams Street, Toledo, Ohio 43624, by United States mail, postpaid, this day of , 1981. I further certify that all parties required to be served have been so served.

RICHARD DAVID DRAKE
Assistant Attorney General

APPENDIX

Page

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No. 79-3100

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

ROBERT LONBERGER,
Petitioner-Appellant,

v.

ARNOLD R. JAGO, Superintendent
Southern Ohio Correctional Facility,
Respondent-Appellee.

APPEAL from the United States District Court
for the Northern District of Ohio, Western Division.

Decided and Filed December 1, 1980

Before: LIVELY and BROWN, Circuit Judges, and PECK, Senior Circuit Judge.

PECK, Senior Circuit Judge. This is an appeal from an order of the United States District Court for the Northern District of Ohio, Western Division, dismissing petitioner's Motion for a Writ of Habeas Corpus. Petitioner, Robert Lonberger, is an Ohio prisoner who was convicted by a jury of aggravated murder with a "specification," which resulted in the death penalty under Ohio's sentencing enhancement statute. Subsequently, the Ohio Court of Appeals reversed the conviction of aggravated murder, and reduced the verdict to the lesser included offense of murder. On remand, the trial court sentenced the defendant to fifteen years to life imprisonment.

Petitioner challenges the constitutionality of his Ohio conviction, and we here consider (1) whether it was error for the trial court to allow evidence of a prior conviction of attempted murder to go to the jury at the same time that the jury was deciding petitioner's guilt or innocence on the substantive charge; and (2) whether the district court erred in holding that petitioner's guilty plea to a charge of attempted murder, the basis of the "specification," was knowingly and voluntarily made.

I.

Petitioner was indicted by the Lucas County, Ohio, Grand Jury and charged with murder while committing rape, defined by Section 2903.01(B), Ohio Rev. Code, as "aggravated murder."[1] The indictment further contained a "specification" that petitioner had been previously convicted of attempted murder. The Ohio statutes under which petitioner was tried provided for life imprisonment upon conviction of aggravated murder unless, in addition to the principal offense, one of seven "specifications" listed in O.R.C. Section 2929.04 was charged and proved at trial, in which case the defendant could be sen-

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1 O.R.C. Section 2903.01 reads:

(A) No person shall purposely, and with prior calculation and design, cause the death of another.

(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

(C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

tenced to death. O.R.C. Section 2929.02[2] and 2929.03[3]. A prior conviction of attempted murder was one of the "speci-

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2 O.R.C. Section 2929.02 provides, in pertinent part:

(A) Whoever is convicted of aggravated murder in violation of section 2923.01 of the Rivised Code shall suffer death or be imprisoned for life, as determined pursuant to sections 2929.03 and 2929.04 of the Revised Code. In addition, the offender may be fined an amount fixec by the court, but not more than twenty-five thousand dollars.

3 O.R.C. Section 2929.03 provides:

(A) If the indictment or count in the indictment charging aggravated murder contains no specification of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge, thr trial court shall impose sentence of life imprisonment on the offender.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard, which shall include an instruction that a specification must be proved beyond a reasonable doubt in order to support a guilty verdict on such specification, but such instruction shall not mention the penalty which may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, the trial court shall impose sentence of life imprisonment on the offender. If the indictment contains one or more specifications listed in division (A) of such section, then following a verdict of guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be determined:

(1) By the panel of three judges which tried the offender upon his waiver of the right to trial by jury;

(2) By the trial judge, if the offender was tried by jury.

(D) When death may be imposed as a penalty for aggravated murder, the court shall require a pre-sentence investigation and a psychiatric examination to be made, and reports submitted to the court pursuant to section 2947.06 of the Revised Code. Copies of the reports shall be furnished to the prosecutor and to the offender or his counsel. The court shall hear testimony and other evidence, the statement, if any, of the offender, and the arguments, if any, of counsel for the defence and prosecution, relevant to the penalty which should be imposed

fications" prescribed by the statute. O.R.C. Section 2929.04-(A)(5)[4].

The evidence adduced at trial on the principal charge revealed that on the night of January 29, 1975, Charita Lanier was brutally murdered. The cause of death was exsanguination resulting from a severe laceration of the neck. A bloodstained and bent twelve-inch knife belonging to the victim was found at the scene and identified as the probable murder weapon. An autopsy performed the following morning revealed the presence of sperm in the vaginal canal. No bruises or external signs of trauma were found with the exception of the fatal laceration of the neck. The State also offered testimony that the petitioner was with the victim in her home the night of her death, and introduced into evidence blood-spotted clothing belonging to the defendant.

The state sought to prove the specification of a prior conviction in addition to proving the substantive charge. To this end, the state introduced into evidence a conviction statement, with the indictment appended, from Cook County,

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on the offender. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make such statement under oath or affirmation.

(E) Upon consideration of the reports, testimony, other evidence, statement of the offender, and arguments of counsel submitted to the court pursuant to division (D) of this section, if the court finds, or if the panel of three judges unanimously finds that none of the mitigating circumstances listed in division (B) of section 2929.04 of the Revised Code is established by a preponderance of the evidence, it shall impose sentence of death on the offender. Otherwise, it shall impose sentence of life imprisonment on the offender.

4 O.R.C. Section 2929.04 provides, in pertinent part:

(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictmentpursuant to section 2941.14 of the Revised Code, and is proved beyond a reasonable doubt:

* * *

(5) The offender has previously been convicted of an offense of which the gist was the purposeful killing of or attempt to kill another, committed prior to the offense at bar, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

Illinois. These documents indicated that a Robert Lonberger had been convicted of attempted murder in 1972.

Petitioner's pre-trial motion to dismiss the specification on the ground that his 1972 guilty plea to attempted murder had not been knowingly and voluntarily made was rejected by the trial court. The prosecutor and the trial court also rejected appellant's offer to stipulate to having committed the prior offense (the stipulation would have kept from the jury the details of the prior offense, including the fact that it too involved an attack upon a woman with a knife). The admission into evidence of the conviction statement was accompanied by an instruction to the jury that it was not to consider the prior conviction in determining the defendant's guilt or innocence on the substantive charge.

On May 30, 1975, a jury returned a verdict of guilty against the petitioner on the charge of aggravated murder, and it further found him guilty of the specification. Petitioner appealed to the Ohio Court of Appeals, which reversed the verdict of guilty of aggravated murder on the grounds that the State had failed to establish the elements of rape or the identity of the appellant as the offender beyond a reasonable doubt. The Ohio appeals court reduced the verdict to the lesser included offense of murder and remanded the case for sentencing, whereupon defendant was sentenced to fifteen years to life. After exhausting his state court remedies, appellant petitioned the district court for a writ of habeas corpus, which was denied.

II.

Petitioner first charges that the evidence of his prior conviction was not admissible under Ohio law. Alternatively, he argues that a one-stage trial at which evidence of a prior conviction is introduced solely on the issue of punishment violates the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. Petitioner argues that he is entitled, therefore, to a bifurcated trial at which a jury must pass upon the principal offense charged prior to the introduction of any evidence of his previous conviction, which only goes to prove the specification.

With regard to Ohio law, the Ohio Supreme Court rejected the identical argument in **State v. Gordon**, 28 Ohio St. 2d 45 (1971). There the court held that where it is necessary to charge a prior offense in the indictment for purposes of enhanced punishment, as a matter of state law the prior offense becomes an alement of the second offense, and, therefore, "[i]t is not reversible error to read to the jury an indictment which contains the averment of a prior conviction or to place such indictment in the jury's possession during its deliberations [in a single-stage trial] . . . ."

The Ohio legislature has explicitly required that the specification charged here be alleged in the indictment.[5] We conclude, therefore, on the authority of **State v. Gordon**, that the admission of petitioner's prior conviction in a single-stage trial conformed with Ohio's rules of evidence and criminal procedure.

Petitioner's constitutional attack on Ohio's procedure is adequately answered by the **Spencer v. Texas**, 385 U.S. 544 (1967), decision and its progeny. In **Spencer v. Texas** the Supreme Court declined to hold that the Texas procedure of enforcing its recidivist statutes, a procedure identical to that utilized by Ohio in the instant case, violated the due process clause of the Fourteenth Amendment. The Court there recognized the inherent prejudice of prior crimes evidence, but reasoned that a defendant's interest in avoiding such prejudice is outweighed by the state's interest in trying all the issues in a one-stage trial. Following the **Spencer v. Texas** decision, we stated: "[C]ombining in one indictment charges of prior offenses together with the immediate charges, reading the entire indictment to the jury and offering proof of such earlier offenses, all before submitting the case to the jury, [is] not a state practice offensive to the proscriptions of the Fourteenth Amendment." **Haggard v. Henderson**, 382 F.2d 288, 289 (6th Cir. 1967). *See also* **Evans v. Cowan**, 506 F.2d 1248 (6th Cir. 1974); **Wilson v. Wiman**, 386 F.2d 968 (6th Cir. 1967).

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5 *See* Footnote 4, *supra.*

Appellant's attempts to distinguish **Spencer v. Texas** are not persuasive. He argues, for example, that the **Spencer** court noted in its opinion that the prior convictions in Texas were made an element of the principal crime under the Texas habitual criminal statutes. Thus, he continues, the legitimate state purpose in introducing evidence of prior crimes in **Spencer**-type cases is absent here, where the penalty provisions are separate and distinct from the substantive offense. The distinction drawn by petitioner is nowhere to be found in **Spencer.** To the contrary, the Texas recidivist statutes at issue in **Spencer** are very similar to the enhanced punishment statute as issue here.[6] Each of the statutes is concerned solely with the enhancement of punishment; none expressly make a prior conviction an element of a substantive offense.

Appellant would fare no better were we to accept his proposed distinction. For the Ohio Supreme Court has held that a prior conviction is a factual element of the substantive crime to be proved where the prior offense has been charged in the indictment under Ohio's enhanced punishment statutes. **State v. Gordon,** 28 Ohio St. 2d 45 (1971).

Petitioner further argues that the evidence of his previous conviction was particularly inflammatory, an allegation conspicuously absent in **Spencer v. Texas.** Here the jury was given

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6 The recidivist statutes involved in **Spencer v. Texas,** 385 U.S. 554 (1967), were Articles 62, 63 and 64 of the Vernon's Ann. Texas Pen. Code (1952).

Article 62 provides: If it be shown on the trial of a felony less than capital that the defendant has been before convicted of the same offense, or one of the same nature, the punishment on such second or other subsequent conviction shall be the highest which is affixed to the commission of such offenses in ordinary cases.

Article 63 provides: Whoever shall have been three times convicted of a felony less than capital shall on such third conviction be imprisoned for life in the penitentiary.

Article 64 provides: A person convicted a second time of any offense to which the penalty of death is affixed as an alternate punishment shall not receive on such second conviction a less punishment than imprisonment for life in the penitentiary.

a copy of the indictment accompanying petitioner's conviction statement. The indictment charged that the defendant "attempted to kill Dorothy Maxwell by cutting Dorothy Maxwell with a knife." Thus, the jury was apprised of the fact that the defendant had previously attempted to murder a woman with a knife, a crime strikingly similar to the one for which he was on trial. In **Haggard v. Henderson**, 382 F.2d 288 (6th Cir. 1967), a Tennessee defendant was found guilty of burglary and larceny in a case in which the prosecution introduced evidence of eight prior convictions for offenses ranging from larceny to attempted murder. The eight prior offenses were offered under the auspices of Tennessee's habitual criminal statute, which required only three prior convictions to be proved. We reversed the district court's grant of a writ of habeas corpus, despite the potential for inflaming the jury by the overkill techniques employed by the state, holding that **Spencer v. Texas** was not "critically distinguish[able]." 382 F.2d at 290. One judge noted that absent the **Spencer** decision, he would have voted to affirm the district court. *Id.* (Edwards, J., concurring). Were we writing on a clean slate, we might vote to reverse the conviction at bar due to the inflammatory nature of the prior crime evidence, especially in light of petitioner's offer to stipulate to the previous offense. We are constrained to hold, however, that no violation of defendant's right to due process occurred in view of **Spencer v. Texas** and our decision in **Haggard v. Henderson.**

Appellant also asserts, without elaboration, that the single-stage trial procedure used in Ohio denied him his Fifth Amendment privilege against self-incrimination, and "chilled" his Sixth Amendment right to a jury trial. The former contention was considered and rejected by the Supreme Court in **McGautha v. California**, 402 U.S. 183 (1971), and requires no further comment. Petitioner's Sixth Amendment argument is that prior crimes evidence may be so prejudicial that a defendant is forced to explore the possibility of pleading guilty to a lesser offense in order to avoid a jury trial and the attendant possible death sentence. The argument assumes that limiting instructions are incapable of mitigating the impact of the disclosure to the jury of the prior conviction. "To say the United States Constitution is infringed simply because this type of evidence may be prejudicial and limiting instructions inadequate

to vitiate prejudicial effects, would make inroads into this entire complex code of state criminal evidentiary law, and would threaten other large areas of trial jurisprudence." **Spencer v. Texas,** *supra,* at 562. The Court there went on to say: "This type of prejudicial effect is acknowledged to inhere in criminal practice, but it is justified on the grounds that (1) the jury is expected to follow instructions in limiting this evidence to its proper function." *Id.*

Petitioner's challenge to Ohio's single-stage procedure is without merit.

III.

We next address the issue of whether petitioner's prior conviction was inadmissible because his plea of guilty was involuntary.

An invalid conviction may not be used to enhance sentencing. **Burgett v. Texas,** 389 U.S. 109 (1967). An involuntary plea of guilty renders a conviction based thereon constitutionally invalid. **Boykin v. Alabama,** 395 U.S. 238 (1969). A guilty plea will be deemed involuntary unless there is a showing that it was intelligently and knowingly entered - an issue governed by federal standards. *Id.*

In the instant case, the State offered, as proof of the voluntariness of petitioner's 1972 plea of guilty to attempted murder in Cook County, Illinois, a conviction statement, and a transcript of the plea's acceptance.

The conviction statement avers that records of the circuit court of Cook County, Illinois, show that a Robert Lonberger was indicted and charged with "AGGRAVATED BATTERY, ETC." That document further states that after initially pleading not guilty, Lonberger withdrew his plea, offered to plead guilty, and his offer was accepted after the trial judge explained the consequence of a guilty plea to the defendant. Petitioner stipulated at trial that he was the Robert Lonberger named in the conviction statement.

The indictment was composed of four charges: three counts of "aggravated battery" and one count of "attempt." With the

exception of one of the aggravated battery charges, all of the offenses charged in the indictment were committed against one Dorothy Maxwell, and occurred on the same date. That part of the indictment charging the offense of "attempt" specified that a Robert Lonberger "with intent to commit the offense of murder, intentionally and knowingly attempted to kill Dorothy Maxwell with a knife." Notwithstanding the conviction statement's averment that the trial judge explained the consequences of a guilty plea to the defendant, at no time juring the hearing at which the guilty plea was entered were the words "murder" or "attempted murder" mentioned by anyone. The transcript of the 1972 Chicago hearing reveals that the following colloquy took place following a conference among the trial judge, the prosecutor and Lonberger's counsel:

> The Court: In other words, you are pleading guilty, that you did on August 25, 1968, commit the offense of aggravated battery on one Dorothy Maxwell, and that you did on the same date attempt on Dorothy Maxwell, with a knife, is that correct?

The Constitution requires, at a minimum, that there be an affirmative showing that a plea of guilty was intelligent and knowing before it is accepted by the trial judge. **Boykin v. Alabama,** *supra,* at 242.

In **Henderson v. Morgan,** 426 U.S. 637, 645 (1976), the Supreme Court, holding that a defendant must receive "real notice of the true charges against him," observed:

> A plea may be involuntary either because the accused does not understand the nature of the constitutional protection that he is waiving or because he has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt. Without adequate notice of the nature of the charge against him, or proof that he in fact understood the charge, the plea cannot be voluntary in this latter sense.

426 U.S. at 645.

In view of the trial judge's failure to apprise the petitioner at any time that he was pleading guilty to attempted murder, and it nowhere affirmatively appearing in the transcript that

the petitioner was aware that his plea was to the charge of attempted murder, we are compelled to conclude that the transcript on its face is inadequate to show that the defendant understood the charge to which he was pleading.

In **Roddy v. Black,** 516 F.2d 1380 (6th Cir. 1975), we held that "[I]n the face of an inadequate transcript at the time of a guilty plea's acceptance, the state must make a clear and convincing showing that the plea was in fact knowingly and understandably entered." Moreover, the state is not relieved of this duty were the conviction being attacked arose in another jurisdiction. **Graig v. Beto,** 458 F.2d 1131 (5th Cir. 1972); U.S. *ex rel* **Savini v. Jackson,** 250 F.2d 349 (2d Cir. 1957).

In **Roddy v. Black,** *supra,* a case decided prior to **Henderson,** *supra,* we refused to find a conviction invalid where the transcript disclosed that the judge who accepted the petitioner's plea of guilty to assault and battery and immoral and indecent practices made reference only to a charge of "A&B" during the proceeding. Unlike the present case, however, in **Roddy** the state introduced testimony of the petitioner's counsel, the prosecutor, and testimony of the judge who accepted the plea to the effect that the defendant "in fact knew the nature of the charges to which he was pleading guilty." 516 F.2d at 1385. No such evidence was presented at petitioner's pretrial hearing in the present case. In fact, the only extrinsic evidence was the testimony of petitioner. He testified that he had not been apprised of the nature of the charges against him in the 1972 Chicago conviction. He stated that his attorney had told him that he was "copping out to aggravated battery." Peitioner further testified that he never personally received or read the indictment.

In the instant case, the state produced no evidence that petitioner received or read the 1972 indictment charging him with attempted murder. The state introduced no evidence that petitioner's counsel or the court explained that he was charged with attempted murder. Finally, the transcript is inadequate to show that petitioner understood that he was pleading guilty to attempted murder. We hold, therefore, that the state failed to meet its burden to show by clear and convincing evidence that the defendant understood the nature of the charge against him.

We find it unnecessary to decide the additional issues raised by the petitioner in this appeal in view of our holding today that his Ohio conviction was unconstitutional.

The district court is reversed. We remand the case to the district court with directions to issue a writ of habeas corpus unless the State of Ohio grants petitioner a new trial within a reasonable time to be determined by the district court.

No. 79-3100

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

ROBERT LONBERGER
Petitioner-Appellant,

v.

ARNOLD R. JAGO, Superintendent
Southern Ohio Correctional Facility
Respondent-Appellee.

ORDER

Filed December 30, 1980

Before: LIVELY and BROWN, Circuit Judges, and PECK, Senior Circuit Judge.

Respondent-appellee's petition for rehearing asserts, first, that remand for an evidentiary hearing, rather than for issuance of the writ, is proper in this case, and second, that the issue of the validity of Lonberger's earlier guilty plea is mooted by the state court's reduction of Lonberger's sentence.

Respondent's first assertion relies on **Townsend v. Sain**, 372 U.S. 293 (1963). That case dealt with the power of federal courts to receive evidence where an applicant for a writ of habeas corpus alleges facts which would entitle him to relief. *Id.* at 312. It does not require this Court to allow prosecutors multiple post-trial opportunities to prove facts which should be apparent from transcripts of original proceedings. As Justice Douglas wrote, speaking of guilty pleas, "The requirement that the prosecution spread on the record the prerequisites of a valid waiver is no constitutional innovation." **Boykin v. Alabama**, 395 U.S. 238, 242 (1969).

Respondents's second contention is meritless. Lonberger was convicted following a trial at which evidence of a "specification" (prior conviction) was presented. The relevant prior

conviction was the result of an invalid guilty plea. Evidence of this "specification" is entirely irrelevant to the offense of murder of which Lonberger now stands convicted. The effects of this exceedingly prejudicial evidence cannot be expunged by reducing Lonberger's sentence.

The petition for rehearing is ordered DENIED.

/s/ John P. Hehman,
Clerk of Court

No. 79-3100

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

ROBERT LONBERGER
Petitioner-Appellant,

v.

ARNOLD R. JAGO, Superintendent,
Southern Ohio Correctional Facility
Respondent-Appellee.

ORDER STAYING MANDATE

Filed January 21, 1981

ORDERED, That motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date; provided that, if within such thirty days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

ENTERED BY ORDER OF THE COURT.

/s/ John P. Hehman,
Clerk of Court

No. C 77-658

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

ROBERT LONBERGER

Petitioner,

v.

A. R. JAGO, Superintendent

Respondent.

OPINION AND ORDER

Filed December 7, 1978

YOUNG, J:

This cause came to be heard upon the filing of a petition for writ of habeas corpus. 28 U.S.C. Section 2254. Pursuant to Rule 4 of the Rules Governing Section 2254 Proceedings, this Court undertook a preliminary examination of the petition and issued a show cause order on June 14, 1978. Respondent has filed a responsive pleading to the show cause order.

On September 30, 1975, petitioner was convicted of aggravated murder pursuant to Section 2903.01(A) & (B), Ohio Rev. Code, in the Court of Common Pleas of Lucas County. The evidence adduced at trial revealed that on the night of January 29, 1975, one Charita Lanier was brutally murdered. The cause of death was exanguination resulting from a severe laceration of the neck. A blood-stained and bent 12 inch kitchen knife was found in proximity to the victim and identified as the probable murder weapon. Upon an autopsy, an examination revealed the presence of semen in the vaginal canal. Petitioner was found guilty of the charge of murder while commiting rape and sentenced to death by electrocution. Petitioner appealed his conviction to the court of appeals, and thereafter, sought and received a stay of execution pending the outcome of his appeal. Upon consideration of petitioner's claim, the appeals court reversed the verdict of guilty of aggravated murder and ordered a verdict of guilty to the lesser included offense of murder, a

violation of Section 2903.02 of the revised code. The cause was remanded to the trial court for sentencing, and petitioner was resentenced to a term of from 15 years to life imprisonment. Petitioner is currently incarcerated at the Southern Ohio Correctional Facility in Lucasville, Ohio.

Following petitioner's conviction of the lesser included offense of murder, further appeal and cross appeal were taken, although unsuccessfully, to the Ohio Supreme Court. For purposes here, the Court will consider all states remedies to have been exhausted.

Petitioner is represented by counsel and six grounds are raised as a basis for federal habeas corpus relief. They are:

(1) that the trial court erred in allowing evidence of a prior conviction of attempted murder to go to the jury at the same time that the jury was deciding petitioner's guilt or innocence on the substantive offense;

(2) that the trial court erred in refusing to allow petitioner to sufficiently attack the validity of the conviction upon which the court ultimately grounded its imposition of the death penalty;

(3) that the trial court erred in its refusal to allow petitioner to inquire into the procedures utilized by the prosecutor's office in presenting his case to the grand jury;

(4) that the trial court committed error and deprived petitioner of a fair trial by refusing to allow petitioner to question prospective jurors as to their view on capital punishment;

(5) that the trial court erred in admitting certain evidence regarding the consent to a search, and, that there was insufficient evidence for the ultimate finding that the search was consensual; and

(6) that the Ohio Death Penalty Statute violates the United States Constitution.

I. FIRST GROUND FOR RELIEF

The first allegation, challenging the admission of a prior conviction into evidence before the jury determined petitioner's guilt or innocence on the substantive offense, essentially encompasses a question of state law. The preventing and dealing with crime is much more the business of the individual states than it is of the federal government. **Patterson v. New York,** 432 U.S. 197 (1977). States are free to regulate the procedures in their courts in accordance with their own conception of policy and fairness, unless in so doing, they "offend some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* at 202, *quoting* **Speiser v. Randal,** 357 U.S. 513, 523 (1958); **Snyder v. Massachusetts,** 291 U.S. 97, 105 (1934). Unless fundamental rights specifically secured by the United States Constitution are invaded, it is clearly not the function of habeas corpus to interfere in the administration of a state's criminal law. **Rogers v. Peck,** 199 U.S. 425 (1905).

In the instant case, petitioner was convicted of aggravated murder pursuant to Section 2903.01 violations states that:

> Whoever is convicted of aggravated murder in violation of section 2903.01 of the Revised Code shall suffer death or be imprisoned for life, as determined pursuant to sections 2929.03 and 2929.04 of the Revised Code.

Ohio Revised Code Section 2929.02(A). Ohio Revised Code Section 2929.04 provides in pertinent part that:

> (A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment . . . and is proved beyond a reasonable doubt:
>
> * * *
>
> (5) The offender has previously been convicted of an offense of which the gist was the purposeful killing of or attempt to kill

> another, committed prior to the offense at bar. . . .

During the trial, the state sought to prove that petitioner previously had been convicted of the crime of attempted murder following entry of a guilty plea. In its effort to prove this prior conviction, the state introduced two documents: a conviction statement indicating that in 1971,[1] petitioner was convicted of "aggravated battery, etc.," and to explain the conviction statement, a copy of an indictment which proceeded the conviction charging petitioner with the crime of the attempted murder of a woman with a knife.[2] Petitioner asserts that the submission of this evidence by the trial court was so prejudicial as to constitute a violation of his rights under the Fifth, Sixth, and Fourteenth Amendments. He suggests that this Court so find, and further establish a rule requiring a two-step procedure in which evidence of prior crimes is withheld until a verdict on the substantive offense is returned by the jury.

In **Spencer v. Texas**, 385 U.S. 554, *rehearing denied*, 386 U.S. 969 (1967), the Supreme Court reviewed a procedure under a Texas recidivist statute whereby for sentencing purposes, a jury trying a pending criminal charge was informed of a defendant's past convictions through allegations set forth in an indictment and the introduction of proof regarding such convictions.[3] Upon receiving such information, the trial court charged the jury that matters relating to prior convictions were not to be considered in assessing one's guilt or innocence under

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1. Petitioner refers to a "1971" conviction throughout his petition, however, upon this Court's examination of the record, the applicable conviction appears to have been in March of 1972.

2. *See* Note 4, *infra*.

3. The recidivist statutes involved were Articles 62, 63, and 64 of the Texas Pen. Code (1952).

   Article 62 provides: If it be shown on the trial of a felony less than capital that the defendant has been before convicted of the same offense, or one of the same nature, the punishment on such second or other subsequent conviction shall be the highest which is affixed to the commission of such offenses in ordinary cases.

   Article 63 provides: Whoever shall have been three times convicted of a felony less than capital shall on such third conviction be imprisoned for life in the penitentiary.

   Article 64 provides: A person convicted a second time of any offense to which the penalty is affixed as an alternate punishment shall not receive on such second conviction a less punishment than imprisonment for life in the penitentiary.

the current indictment. The Supreme Court considered the procedure followed by the Texas court and stated that merely because a possibility of collateral prejudice existed, such a procedure would not be rendered unconstitutional under the Due Process Clause. *Id.* at 564. That court addressed itself to the power of the states to promulgate their own rules of evidence and found that Texas' introduction of prior convictions under the recidivist statutes did not offend the provisions of the Due Process Clause. *Id.* at 566-69.

The Sixth Circuit had occasion to rely on **Spencer v. Texas,** *supra,* in the case of **Evans v. Cowan,** 506 F.2d 1248 (6th Cir. 1974), wherein the appellant challenged the constitutionality of the admission of evidence of prior felony convictions before the jury determined guilt or innocence on the substantive charge. The appellant was charged with armed robbery and prior felony convictions were admitted, pursuant to a Kentucky statute, for the purpose of punishment determination. *Id.* at 1248-49. Relying on the **Spencer** case, the court found that there was clear error in admitting such evidence, however, such error rested solely on the basis that no limiting instruction was given to the jury. *Id* at 1249.

The recidivist statute and state procedure considered in the **Spencer** case is similar to that which is currently before this Court. In the instant case, for the purpose of sentencing, the jury received evidence of a prior crime of petitioner.[4] Along with this evidence, the jury was charged with a limiting instruction as to the purpose for which petitioner's prior conviction could be considered. The scope of review before this Court focuses on the issue of whether the procedures followed by the trial court fell below federal constitutional restraints. The Due Process clause permits states wide latitude in fashioning rules of evidence and procedure. **Manning v. Rose,** 507 F.2d

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4. Petitioner allegedly offered to stipulate that the conviction statement's wording of "aggravated battery, etc." included the related offense of attempted murder. This apparently was done to keep the indictment, which accompanied the conviction statement, from being submitted to the jury. This stipulation, however, does not appear to affect the instant decision. From a reading of the dissent in the Spencer case, it appears that an offer to stipulate was made therein and refused by the government. *Id.* at 580. The majority, however, did not choose to raise this distinction as an issue which would affect the constitutionality of the procedure of admitting prior convictions.

889 (6th Cir. 1974). On the basis of the above authority, this Court cannot find that the procedure followed by the Ohio court was outside the scope of what the Fourteenth Amendment will tolerate.

In addition to the Fourteenth Amendment claim, petitioner asserts that evidence of prior criminal convictions violated his constitutionally guaranteed right to a fair and impartial jury and his guarantee against self-incrimination. The Court can see no indication that the fair trial concepts embodied in the Fifth and Sixth Amendments were negated by the introduction of evidence of a prior conviction. Courts justify the introduction of evidence which is potentially prejudicial on the ground that the jury is expected to follow its charge to limit such evidence to its proper function. **Spencer v. Texas,** *supra,* at 562. Although petitioner's prior conviction was petentially prejudicial, the jury was properly instructed as to the limited purpose for which such evidence was to be considered. Petitioner's assertion that he was denied a fair and impartial jury because of the submission of evidence of a prior conviction is not well taken.

Furthermore, the introduction of a prior conviction cannot be said to compel or encourage petitioner to become a witness against himself. The state introduced an indictment and a conviction statement into evidence to meet its burden of proof under the statutory provisions of section 2929.04, Ohio Rev. Code. In no way was petitioner put into a compromising position regarding his testimony. In **McGuatha v. California,** 402 U.S. 183 (1971), the Supreme Court considered a Fifth Amendment claim raised by a defendant who had been convicted of murder under an Ohio statute and subsequently sentenced to death. The applicable Ohio statute was one which imposed a death sentence upon the finding of a guilty verdict of first degree murder, unless the jury recommended mercy to the court, whereupon a life sentence would be imposed. *Id.* at 194. The defendant therein claimed that hsi Fifth Amendment rights were violated in that he felt compelled to testify in his desire to address a jury, who in their discretion, could sentence him to death. *Id.* In the instant case, the jury which convicted petitioner did not have the option of a mercy finding, thus petitioner was in no way urged to come forward with evidence on his behalf in an attempt to sway the jury. Even if this had

been the situation, on the merit of the **McGuatha** case, there would still have been no infringement of petitioner's Fifth Amendment rights. The Court finds no merit to the Fifth Amendment claim.

II. SECOND GROUND FOR RELIEF

Petitioner's second ground challenges the validity of his 1972 conviction which the state introduced for the determination of punishment. When a state uses a prior conviction to enhance one's punishment, it is bound to defend attacks on the constitutionality of the prior conviction which may be raised. *See* **Burgett v. Texas,** 389 U.S. 109 (1967).

Section 2945.75(B) of the Ohio Revised Code provides that:

> Whenever in any case it is necessary to prove a prior conviction, a certified copy of the entry of judgment in such prior conviction together with evidence sufficient to identify the defendant named in the entry as the offender in the case at bar, is sufficient to prove such prior conviction.

In the instant proceeding, there is no contention that the state failed to meet the above stated burden in that the requisite documentation was submitted and petitioner stipulated to being the individual named in the conviction statement. The alleged error instead lies in the validity of a guilty plea entered in an Illinois court which led to petitioner's prior conviction. Petitioner essentially claims that his prior conviction was invalid since it was based on a guilty plea which was not entered in a voluntary or knowing manner. He asserts that his plea was not voluntary in that he was not apprised of the charges against him at the time of the entry of his guilty plea. Petitioner claims that when the court said:

> In other words, you're pleading guilty that you did on August 25, 1968, commit the offense of aggravated battery, on one Dorothy Maxwell and that you did, on the same date, attempt on Dorothy Maxwell with a knife, is that correct?

And he answered:

> Yes, sir;

he did not realize he was pleading guilty to attempted murder. For a plea of guilty to be constitutionally valid, a defendant must enter the plea both voluntarily and intelligently. **Boykin v. Alabama,** 395 U.S. 238 (1969).

Although the trial court questions its responsibility to inquire into the validity of petitioner's conviction, a pretrial hearing was held to examine whether petitioner's 1972 guilty plea was voluntarily and knowingly entered. The court suggested that the plea might best be attacked in the court in which it was entered, however, it found that the prior conviction was indeed valid. Upon examination of the record of the proceedings, this Court finds that, pursuant to both Ohio and Illinois standards, the guilty plea which petitioner entered in 1972 was both knowingly and intelligently made. The applicable Ohio standard is set forth in the case of **State v. Stone,** 42 Ohio St.2d 163 (1975) in that:

> A defendant's plea of guilty in a filony case, before July 1, 1973, was voluntarily, knowingly, and intellignetly made where the record affirmatively discloses that defendant was advised of the rights he was waiving by competent, privately retained counsel and, in part, by the trial court; that he understood the rights he was waiving, which fact was ascertained by the trial court in a personal inquiry of the defendant; and that he was motivated to do so by a desire to avoid a more severe penalty.

Id. Pursuant to the standard as stated, this Court finds that petitioner's plea satisfied the requirements mandated by applicable Ohio law. The controlling law in Illinois for the acceptance of a guilt plea was more stringent than that of Ohio. Under Illinois law, Supreme Court Rule 402 required substantial compliance with the following:

> (a) *Admonitions to Defendant.* The court shall not accept a plea of guilty without first, by addressing the defendant personally in open

court, informing him of and determing that he understands the following:

(1) the nature of the charge;

(2) the minimum and maximum sentence prescribed by law, including, when applicable, the penalty to which the defendant may be subjected because of prior convictions or consecutive sentences;

(3) that the defendant has the right to plead not guilty, or to persist in that plea if it has already been made, or to plead guilty; and

(4) that if he pleads guilty there will not be a trial of any kind, so that by pleading guilty he waives the right to a trial by jury and the right to be confronted with the witnesses against him.

Ill. Ann. Stat. ch. 110A section 402. The test for determining whether the essentials of section 402 have been met is whether an ordinary person in the same circumstances as the accused would have understood the remarks and advice of the court as conveying the information required. **People v. Cook**, 26 111. App.3d 44, 324 N.E.2d 432 (1975). From a review of the record, this Court is satisfied that an ordinary person would have understood the nature of the charges to which petitioner was pleading guilty. Therefore, the second allegation of the petition is not well taken.

III. THIRD GROUND FOR RELIEF

Petitioner's third allegation contends that he was denied equal protection of the law when his cause was presented to the grand jury in a manner which differed from the cases of others similarly situated. He claims that of all of the individuals against whom felony murder was charged, only in his case were specifications listed in the indictment which subjected him to the death penalty. He claims error in that he was not permited to inquire into the procedures utilized by the Lucas County Prosecutor's office in presenting his case to the grand jury. He does not appear to challenge the indictment itself, but rather the manner in which the state presented his case to that body.

The Supreme Court has repeatedly recognized a long established policy that maintains the secrecy which surrounds grand jury proceedings. **Dennis v. United States,** 384 U.S. 855, 869 (1966); **United States v. Procter & Gamble Co.,** 356 U.S. 677, 681 (1958). Under Rule 6(e), Fed. R. Crim. P., the Court is empowered to disclose matters occurring before the grand jury. Even subsequent to the promulgation of the rule, however, it has been recognized that "when disclosure is permitted, it is to be done 'discretely and limitedly.'" **Dennis v. United States,** *supra,* at 869; **United States v. Proctor & Gamble Co.,** *supra,* at 683. The Ohio Criminal Rules have an analogous rule to Rule 6(e) which deals with disclosure of grand jury matters. Criminal Rule 6(e) of the Ohio Revised Code authorizes a prosecuting attorney to disclose matters occurring before the grand jury:

> when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

The memorandum submitted by petitioner indicates that he was granted a hearing on a motion to dismiss, however, it appears that in favoring the secrecy of grand jury proceedings, the court would not permit inquiry into procedures used by the prosecuting attorney in its presentment of petitioner's case. Permitting the disclosure of matters which occur before the grand jury rests within the discretion of the trial judge. Upon review, this Court does not find that this discretion was abused or that petitioner's equal protection rights were invaded.

In **Oyler v. Boles,** 368 U.S. 448 (1962), the Supreme Court considered petitioners' claim that they were denied equal protection of the law by the selective use of certain criminal statutes. The statutes involved were habitual criminal statutes. Petitioners contended that such statutes which imposed more severe penalties for those persons which came within the statutory standards, were applied only in a minority of cases. *Id.* at 455. The court considered the statistical data presented by the petitioners and found that such evidence was no

indication that the actions of the prosecutors were the result of a deliberate policy of proceeding only in a certain class of class of cases or against specific persons. *Id.* at 456. The Supreme Court went on that say that:

> the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation. Even though the statistics in the case might imply a policy of selective enforcement, it was not stated that the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.

Id. This view has recently been reiterated by the Supreme Court and the court has further asserted that so long as a prosecutor has probable cause to believe that an individual has committed an offense which the law prohibits, "the decision whether or not to prosecute, and what charge to file or being before a grand jury, generally rests entirely in his discretion." **Bordenkircher v. Hayes,** _____U.S._____, 98 S.Ct. 663, 668 (1978).

Even if the Lucas County Prosecutor's Office exercised some selectivity with respect to the presentment of petitioner's case, there is no indication that such action had motivations which would raise a constitutional question. Furthermore, there is no indication that the trial judge abused his discretion in refusing to invade the secrecy which surrounds grand jury proceedings.

IV. FOURTH GROUND FOR RELIEF

The fourth allegation claims error in that the trial court refused to allow petitioner to question prospective jurors about their views on capital punishment during voir dire examination. Petitioner appears to base his fourth allegation on the case of **State v. Bayless,** 48 Ohio St.2d 73 (1976), wherein a defendant asserted error in that the trial court excused a number of prospective jurors who expressed opposition to capital punishment. The Supreme Court of Ohio found that such excuses for cause were valid in that they were not based strictly on a juror's opposition to capital punishment, but rather on a juror's

assertion that he could not render a fair and impartial finding because a death sentence might result. *Id.* at 88. Although the Supreme Court of Ohio asserted that a juror's opinion on capital punishment could prevent him from impartially applying the law to the facts, *Id.* at 89, this Court is not persuaded by petitioner's claim that a failure to inquire into the prospective jurors' views on capital punishment deprived him of a fair trial.

The recent Supreme Court decision of **Ristaino v. Ross,** 424 U.S. 589 (1976), considered whether a black defendant was denied a fair trial because the jury was not questioned specifically about racial prejudice. The Supreme Court found there was no error of constitutional dimension since a general and thorough inquiry as to impartiality was made to the prospective jurors. In reaching its decision, the Supreme Court stated:

> The Constitution does not always entitle a defendant to have questions posed uring *voir dire* specifically directed to matters that conceivably might prejudice veniremen against him. **Ham,** *supra,* at 527-528. *Voir dire* "is conducted under the supervision of the court, and a great deal must, of necessity, be left to its sound discretion." **Connors v. United States,** 158 U.S. 408, 413 (1895); *see* **Ham** *supra* at 527-528; **Aldridge v. United States,** 283 U.S. 308, 310 (1931). This is so because the "determination of impartiality, in which demeanor plays such an important part, is particularly within the province of the trial judge." **Rideau v. Louisiana,** 373 U.S. 723, 733 (1963) (Clark, J., dissenting). Thus, the State's obligation to the defendant to impanel an impartial jury generally can be satisfied by less than an inquiry into a specific prejudice feared by the defendant. **Ham,** *supra* at 527-528. [footnote omited].

Id. at 594-95.

During voir dire examination in the instant case, the veniremen were presented with a number of questions which explored whether they would be able to render an impartial decision as to petitioner's guilt or innocence on the crime charged. There is no indication that the trial court's failure to inquire into the specific matter of capital punishment resulted in the empaneling of a jury which could not render a fair and impartial finding based on the evidence. Therefore, the Court does not find that petitioner was denied a fair trial which violated his rights under the Constitution.

V. FIFTH GROUND FOR RELIEF

The fifth allegation essentially claims that petitioner's residence was searched without proper consent. He further claims that it was error for the trial court to admit alleged hearsay testimony into evidence when considering the matter and that there was insufficient evidence for the ultimate finding that the search in question was in fact consentual.

It is well established that evidentiary questions are not cognizable in federal habeas corpus "unless it is shown that the errors are no conspicuously prejudicial as to deprive the defendant of a fair trial." **Reese v. Caldwell**, 410 F.2d 1125, 1126 (6th Cir. 1969), *quoting,* **United States ex rel. Cannon v. Maroney**, 373 F.2d 908, 910 (3rd Cir. 1967). This Court does not find that the effect of the alleged error in the instant case was so prejudicial as to deny petitioner's constitutional right to a fair trial. Furthermore, petitioner received a full and fair hearing on the issue at a state court motion to suppress hearing. This being so, the matter is not cognizable in a federal habeas corpus proceeding. **Stone v. Powell**, 428 U.S. 465 (1976). Thus, the Court finds the fifth ground for relief not well taken.

VI. SIXTH GROUND FOR RELIEF

The final allegation challenges the constitutionality of the Ohio Death Penalty Statute. In view of the recent Supreme Court decision in **Locket v. Ohio,** _____U.S._____(1978), the death penalty in Ohio has been ruled unconstitutional and therefore consideration of this issue is precluded.

THEREFORE, for the reasons stated herein good cause appearing, it is

ORDERED that the petition for writ of habeas corpus be, and it hereby is, dismissed.

IT IS SO ORDERED.

/s/
United States District Judge

Toledo, Ohio.
December 7, 1978.

Civil Action File No. C77-658

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF OHIO / W.D.

Robert Loneberger

Petitioner,

v.

Arnold Jago, Supt.

Respondent.

JUDGMENT

Filed December 7, 1978

This action came on for consideration before the Court, Honorable Don J. Young, United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered.

It is Ordered and Adjudged that the petition for writ of habeas corpus is dismissed.

/s/ James S. Gallas, Esq.
Clerk of Court

Civil Action File No. L-75-208

COURT OF APPEALS OF OHIO, SIXTH DISTRICT
COUNTY OF LUCAS

State of Ohio,

Appellee,

v.

Robert Lonberger,

Appellant.

DECISION AND JOURNAL ENTRY

Filed April 22, 1977

This cause came on to be heard upon the record in the trial court. Each assignment of error was reviewed by the court and upon review the following disposition made:

Defendant-appellant Lonberger, (hereinafter appellant), was indicted on two counts: (1) murder with prior calculation and design in violation of R.C. 2903.01(A), to which specifications were attached charging a prior conviction of attempted murder and murder while committing rape, and (2) murder while committing rape in violation of R.C. 2903.01(B), to which a specification was attached charging a prior conviction of attempted murder.

Appellant was tried by jury. The evidence at trial revealed the following. At approximately 10:00 p.m. on the night of January 29, 1975, Charita Lanier was murdered in her home at 1518 Fernwood, Toledo. Death resulted from exsanguination from a throat wound. Blood stains indicated that the victim was knifed in the living room and that her body was then dragged to the kitchen, where it was found, partially clothed, in a freezer. A blood-stained knife was found in the kitchen sink. The presence of semen in the victim's vaginal canal indicated sexual intercourse within an undetermined period preceding her death. The victim's sons, Hillary and Kazedore Lanier, ages 8 and 6, respectively, identified the appellant and testified that while the appellant was there, he, Hillary, had heard a scream. Kazedore testified that he went downstairs from his bedroom

later that evening to the kitchen; that the lights downstairs were all off; that he did not see his mother, but that the appellant refused to let him turn on the lights and told him to return to the upstairs, which he did. On the basis of this and other circumstantial evidence, including blood-spotted clothing belonging to the appellant and a cigarette pack of appellant's brand found in the house, appellant was found guilty on the second count of the indictment and on the specification attached thereto. Following psychiatric examination and re-examination, a mitigation hearing was held pursuant to R.C. 2929.04(B), and no mitigating circumstances being found, the trial judge sentenced appellant to be executed. Appellant appeals the judgment and the sentence, assigning eleven assignments of error.

Appellant's first and second assignments of error, relating to the evidence of his prior conviction, are as follows:

> "1. THE TRIAL COURT ERRED IN ALLOWING EVIDENCE OF A PRIOR CONVICTION OF ATTEMPTED MURDER TO GO TO THE JURY AT THE SAME TIME THAT THAT BODY WAS DECIDING THE DEFENDANT'S GUILT OR INNOCENCE OF THE SUBSTANTIVE OFFENSE.
>
> II. THE TRIAL COURT ERRED IN REFUSING TO ALLOW THE DEFENDANT TO ATTACK THE VALIDITY OF THE CONVICTION UPON WHICH THE COURT ULTIMATELY GROUNDED ITS IMPOSITION OF THE DEATH PENALTY."

Under Ohio's new criminal code, the death penalty for aggravated murder is precluded unless the indictment charging the offense specifies one or more of the aggravating circumcircumstances listed in R.C. 2929.04(A). If the indictment specifies an aggravating circumstance that circumstance must be proved beyond a reasonable doubt and the fact finder must return separate verdicts on the charge and on the specification. If the fact finder be a jury, the jury must be instructed on its duties in regard to its findings on the specification. A prior conviction for purposeful killing or attempt to kill is an aggra-

aggravating circumstance under R.C. 2929.04(A).

Appellant contends in his first assignment of error that the prior conviction was not an element of the crime of aggravated murder with which he was charged, and therefore, that it was error for the court to allow evidence of the prior conviction to go to the jury. In the alternative, appellant argues that if evidence of a prior conviction was properly submitted to the jury, nevertheless it was prejudicial and, therefore, a violation of his right to a fair trial to allow submission of such evidence at the same time the jury was determining the appellant's guilt of the principal offense charged. We find this assignment of error not to be well taken for the following reasons.

In Spencer v. Texas (1967), 385 U.S. 554, the United States Supreme Court reviewed a Texas recidivist statute which was similar to Ohio's R.C. 2929.03 in providing that the indictment charging the pending crime should also specify past convictions and that the jury which determined guilt of the pending crime should also find as to whether the defendant had previously been convicted of a similar offense. The Court acknowledged that states have a valid governmental interest in the convenience of trying at one time the elements of the crime charged and the elements of circumstances which would enenhance the penalty. The Court held that the Texas recidivist statute was not unconstitutional since under the statute the jury which heard the evidence of the prior conviction was given instructions limiting its consideration of that evidence to its proper function.

Citing from Spencer, supra, the Ohio Supreme Court held in State v. Gordon (1971), 28 Ohio St. 2d. 45, that where a criminal statute provides that in order to impose a second offense penalty it is necessary to charge a prior conviction in the indictment, that former conviction becomes an element of the present offense charged and it is not error "to read to the jury an indictment which contains the averment of a prior conviction or to place such indictment in the jury's possession during its deliberations."

Appellant contends in his second assignment of error that the trial court erred in ruling, in a preliminary order, that the prior conviction was valid and admissible in evidence at the trial.

Pursuant to R.C. 2929.04(A), the state has the burden of proving the specifications, such as the prior conviction, beyond a reasonable doubt. The means of proof is set forth at R.C. 2945.75(B), which reads as follows:

> "Whenever in any case it is necessary to prove a prior conviction, a certified copy of the entry of judgment in such prior conviction together with evidence sufficient to identify the degendant named in the entry as the offender in the case at bar, is sufficient to prove such prior conviction.

In the instant case, the state sought to prove appellant's prior conviction by introducing into evidence a certified copy of a 1972 conviction statement from Illinois showing that the Cook County Circuit Court had in that year entered a guilty judgment against a Robert Lonberger on a plea of guilty to the crime of "AGGRAVATED BATTERY, ETC. in manner and form as charged in the Indictment in this cause." The indictment, which the state also sought to admit in relevant part, contained four charges: two counts of aggravated battery on Dorothy Maxwell, one count of attempted murder on Dorothy Maxwell, and one count of aggravated battery on Wendtian Maxwell. Appellant stipulated his identity as the person named in the conviction statement.

In a pre-trial hearing to determine the admissibility of the conviction statement, appellant argued that his prior conviction was invalid in that he had not knowingly pled guilty to attempted murder, but had knowingly pled guilty only to aggravated battery. When the state wishes to use a defendant's prior conviction in subsequent proceedings for the purposes of enhancement of punishment, the state is bound to defend attacks on the constitutionality of the prior conviction leveled by the defendant. See Burgett v. Texas (1967), 389 U.S. 109; State v. Johnson (1971), 26 Ohio St. 2d. 43. One of the basic requirements of a constitutional plea of guilty is that it be voluntarily and intelligently entered by the accused. Boykin v. Alabama (1969), 395 U.S. 238.

In State v. Stone (1975), 43 Ohio St. 2d. 163, the Ohio Supreme Court held:

> "A defendant's plea of guilty in a felony case, before July 1, 1973, was voluntarily, knowingly and intelligently made where the record affirmatively discloses that defendant was advised of the rights he was waiving by competent, privately retained counsel and, in part, by the trial court; that he understood the rights he was waiving, which fact was ascertained by the trial court in a personal inquiry of the defendant; and that he was motivated to do so by a desire to avoid a more severe penalty."

See also State v. Griffey (1973), 35 Ohio St. 2d. 101, and State v. Piacella (1971), 27 Ohio St. 2d. 92.

The transcript from the Cook County Circuit Court proceedings at which appellant changed his plea to guilty indicated that he was represented by competent counsel. When questioned by the court, appellant answered affirmatively that he was pleading guilty to "the offense of aggravated battery on one Dorothy Maxwell, * * * attempt on Dorothy Maxwell, with a knife, * * * [and] the offense of aggravated battery on Wendtian Maxwell * * *." Appellant further affirmed that he understood that he was waiving his right to trial and to confront witnesses, that he understood the penalties that could be imposed, that he was motivated to plead guilty by an offer of a reduced sentence, and that he had not otherwise been threatened or promised anything. Through his counsel, appellant stipulated that there were sufficient facts to sustain the charges contained in the indictment. We find from the record of this proceeding and from the record of the pre-trial hearing in the instant case, that the trial court did not err in ruling that appellant's guilty plea was voluntarily and knowingly made and that the evidence of the prior conviction should be submitted to the jury. Appellant's second assignment of error is not well taken.

Appellant's assignment of error No. 3 is as follows:

> "III. THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS CERTAIN EVIDENCE SEIZED IN THREE WARRANTLESS SEARCHES CONDUCTED AT THE DEFENDANT'S RESIDENCE AT 915 HESTON STREET."

Toledo Police Department Detective Howard conducted three warrantless searches of the residence at 915 Heston Street, Toledo, one at about noon on January 30, 1975, one the evening of January 30, and one on January 31, 1975. Nothing was found or removed on the first search, but items of clothing and a cassette were removed during the subsequent searches. Appellant claims that these searches were in violation of the Fourth Amendment to the United States Constitution, and that his motion to suppress the evidence seized should have been granted at the pre-trial suppression hearing, because the prosecutor failed to prove valid and voluntary consent by thrid parties to the search in that the testimony Detective Howard offered to establish consent to search was hearsay and, therefore, inadmissible.

Third parties may give consent to a search, the results of which may be introduced at trial into evidence against the accused, so long as the consent is voluntarily given and the thrid person owns or controls the premises, or has equal rights to the possession or use of the premises. United States v. Matlock (1974), 415 U.S. 164. The person giving consent to search need not have been advised of his right to refuse in order for such consent to be considered voluntary. Schneckloth v. Bustamonte (1973), 412 U.S. 218.

When the lawfulness of the search is challenged, the prosecution has the burden of proving that the consent was freely given. Bumper v. No. Car. (1968), 391 U.S. 543, 548; State v. McCarthy (1969), 20 Ohio App. 2d. 275, aff'd. 26 Ohio St. 2d. 87 (1971). The burden must be met by a preponderance of evidence. Lego v. Twomey (1972), 404 U.S. 477. See also 1 Anderson's Ohio Criminal Practice & Procedure, Sec. T. 23.6(B)(2) (b).

At the pre-trial hearing, Detective Howard testified that he received permission to search the house at 915 Heston Street the first time from Verlene Washington, who was present and lived in the house. This first search was for the person ofthe appellant. Subsequently, on January 30, after the appellant had been arrested, Detective Howard searched the house again, this time for evidence. He testified that he had permission to search the house from the owner, Ethel Washington, as well as consent from the appellant and from Everlene Bobo to search their bedroom. Further, Detective Howard testified that on Janurary

31st Everlene Bobo called him to report that she had found clothing that he was looking for in the basement of the house. He returned to the residence to get the clothing, and Verlene Washington let him in and gave him permission to retrieve the items from the basement.

If Detective Howard's testimony be accepted as true, the preponderance of evidence would support the legality of the searches based on the valid consent of third parties. However, appellant contends that Detective Howard's testimony relative to consent was hearsay and therefore inadmissible. The rules of evidence normally applicable in criminal trials do not operate with full force at hearings before the judge to determine the admissibility of evidence; hearsay evidence may be admissible in a suppression hearing if the judge is convinced that the statements had, in fact, been made and that the statements were true. United States v. Matlock, supra at pp. 172-77. Since the appellant here did not call any witnesses at the suppression hearing to contradict Detective Howard's testimony relative to the consent to search, we find it was not an abuse of the trial court's discretion to admit the hearsay evidence and to deny the motion to suppress based on that evidence. Appellant's assignment of error No. 3 is not well taken.

Appellant's assignment of error No. 4 is as follows:

> "IV. WHERE THE ONLY EVIDENCE SUPPORTING A CONVICTION OF RAPE IS CIRCUMSTANTIAL, AND THERE EXISTS A REASONABLE THEORY OF INNOCENCE WHICH IS CONSISTENT WITH THE EVIDENCE SO PRESENTED, THE CONVICTION CANNOT STAND FOR IT IS GROUNDED IN INSUFFICIENT EVIDENCE AND IS THEREFORE CONTRARY TO LAW AND THE TRIAL COURT ERRED IN NOT GRANTING A DIRECTED VERDICT AS TO THE SECOND COUNT OF THE INDICTMENT."

R.C. 2907.02 defines the crime of rape, in pertinent part, as follows:

> "(A) No person shall engage in sexual conduct with another, not the spouse of the offender, when any of the following apply:

"(1) The offender purposely compels the other person to submit by force or threat of force.

* * *

The prosecution must prove all elements of the crime and the identity of the defendant as the offender beyond a reasonable doubt. 15A Ohio Jur. 2d. Crim. Prac. and Procedure, Sec. 203.

In proof of rape, the prosecution offered the following circumstantial evidence: the presence of semen in the victim's vagina and the fact that when found, the victim was dressed only in socks and in a bra, blouse, and sweater, which were torn. The semen was not laboratory tested so that it could be compared to appellant's sperm or blood type, and expert testimony as to the rate of disintegration of sperm failed to indicate when intercourse occured in relation to the time of death. In proof of the identity of the appellant as the offender, the prosecution offered testimony of the victim's young sons that the appellant was present in the victim's home the evening of January 29 when the murder and alleged rape occurred.

At the close of the prosecution's evidence, the appellant moved for a dismissal, inter alia, of the count of the indictment charging rape on the grounds that the state had failed to make a prima facie case. The court denied this motion, which was in effect a motion for judgment of acquittal, and the appellant proceeded to his defense. Appellant failed to renew the motion for acquittal at the conclusion of all the evidence. Failure to renew the motion precludes this court from considering on appeal whether the trial court's denial of the motion at the end of the state's evidence was error. State v. Cantu (1971), 27 Ohio App. 2d. 55; State v. Pinnick (1937), 23 Ohio L. Abs. 560; 1 Anderson's Ohio Criminal Practice and Procedure, Sec. T 36.4. In this respect, appellant's assignment of error No. 4 is not well taken.

Assignment of error No. 4 further alleges error in that the conviction of rape is grounded in insufficient evidence and is contrary to law. Where the state relies exclusively on circumstantial evidence for proof of a crime, the inferences created

therefrom must be of such character that they are wholly inconsistent with any reasonable conclusion other than defendant's guilt. State v. Kulig (1974), 37 Ohio St. 2d. 157; State v. Sheppard (1956), 165 Ohio St. 293, cert. den. 352 U.S. 910 (1956) 1 Anderson's Ohio Crim. Prac. & Procedure, Sec. T 32.7.

Reviewing the record, we do not find that the prosecution's evidence established the elements of rape or the identity of the appellant as the offender beyond a reasonable doubt. Rape by the appellant could reasonably be inferred from the evidence, but so could voluntary intercourse, either with appellant or with someone else. Therefore, in respect to the sufficiency of the evidence, we find appellant's assignment of error No. 4 to be well taken.

Appellant's assignment of error No. 5 is as follows:

> "V. THE TRIAL COURT ERRED IN REFUSING TO DISMISS COUNT 1 OF THE INDICTMENT FOR THE REASON THAT THE STATE FAILED TO PRODUCE ANY EVIDENCE FROM WHICH THE JURY COULD CONCLUDE, BEYOND A REASONABLE DOUBT, THAT THE DEFENDANT 'PURPOSELY, WITH PRIOR CALCULATION AND DESIGN, CAUSE[D] THE DEATH OF ANOTHER.' "

Count 1 of the indictment charged appellant with violating R.C. 2903.01(A), which prohibits killing another "purposely, and with prior calculation and design." Count II charged appellant with a violation of R.C. 2903.01(B), which prohibits killing of another "purposely * * * while committing or attempting to commit * * * rape * * *."

We find that as there was circumstantial evidence of prior calculation and design in the fact that the murder was committed in the living room with a knife from the kitchen, the trial court did not err in refusing to dismiss Count 1 of the indictment at the close of the prosecution's evidence. The state having introduced sufficient circumstantial evidence to establish a prima facie case of prior calculation, it was for the jury to

decide whether any conclusion other than appellant's guilt could reasonably be inferred from that evidence.

Furthermore, we note that upon the evidence the jury returned a verdict of guilty to Count 2 of the indictment and guilty of the specification attached thereto. The jury returned no finding on Count 1 of the indictment. It was permissible, although not desirable, for the trial court to accept the verdict in that form. The trial court may receive a verdict in which the defendant is found guilty of one count without a finding as to other counts. Jackson v. State (1883), 39 Ohio St. 37. The failure to find that defendant guilty on Count I is the equivalent of an acquittal of the charges on that count. See Morehead v. State (1877), 34 Ohio St. 212, which states that under the prior criminal code a verdict of guilty of murder in the second degree upon the trial of an indictment for first degree murder without expressly acquitting the defendant of first degree murder is good, the verdict being equivalent to "not guilty" of the higher degree. As the jury acquitted the appellant on Count I, any error in not dismissing that Count cannot be deemed prejudicial. Appellant's assignment of error No. 5 is not well taken.

Appellant's assignment of error No. 7, which we consider here out of order, is as follows:

> "VII. THE DEATH PENALTY CONSTITUTES THE KIND OF CRUEL AND UNUSUAL PUNISHMENT PROHIBITED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, AS WELL AS ARTICLE I, SECTION 9 OF THE OHIO CONSTITUTION, BY OFFENDING CONTEMPORARY STANDARDS OF DECENCY."

The Ohio Supreme Court held in State v. Bayless (1976), 48 Ohio St. 2d. 73, that Ohio's statutory framework for the imposition of capital punishment is constitutional and does not impose cruel and unusual punishment within the meaning of the Eighth Amendment of the United States Constitution. We find appellant's assignment of error No. VII not well taken for the reasons stated in Bayless.

Appellant's assignment of error No. 6 is as follows:

"VI. OHIO REVISED CODE SECS. 2903.01, 2929.03 AND 2929.04 ALLOW IMPOSITION OF THE DEATH PENALTY IN SUCH AN ARBITRARY AND CAPRICIOUS FASHION AS TO CONSTITUTE A VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AS WELL AS ARTICLE I, SECS, 2, 9 AND 16 OF THE OHIO CONSTITUTION."

Of the statutes referred to by the appellant, R.C. 2903.01 defines the crime of aggravated murder, R.C. 2929.03 specifies the procedure for imposing sentence for a capital offense, and R.C. 2929.04 lists the aggravating and mitigating circumstances to be considered in sentencing for a capital offense. Appellant alleges that these sections are unconstitutional in that they allow the imposition of the death penalty in an arbitrary and capricious manner. Specifically, appellant challenges as standardless the discretion exercised at the various levels of the criminal proceeding by the grand jury, the prosecutor, the fact finder, the sentencing authority, and the executive (the pardoning authority).

As to all stages of the criminal proceeding other than the sentencing stage, we follow the reasoning of the United States Supreme Court in Gregg v. Georgia (1976), _____U.S._____, 49 L. Ed. 2d. 859, and the four accompanying death penalty cases, and of the Ohio Supreme Court in State v. Bayless, supra, and find that:

> "The existence of these discretionary stages is not determinative of the issues before us. At each of these stages an actor in a criminal justice system makes a decision which may remove a defendant from consideration as a candidate for the death penalty. Furman, in contrast, dealt with the decision to impose the death sentence on a specific individual who had been convicted of a capital offense. Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution." Gregg, supra at p. 889.

As to the sentencing stage, appellant particularly objects to the statement of mitigating circumstances in R.C. 2929.04(B) as being so vague as to fail to provide adequate standards to guide the sentencing authority. R.C. 2929.04(B) reads as follows:

> "(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a preponderence [preponderance] of the evidence:
>
> "(1) The victim of the offense induced or facilitated it.
>
> "(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.
>
> "(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity."

In respect to those mitigating circumstances, the Ohio Supreme Court held in Bayless, supra, at 86:

> "* * * we conclude that those [mitigating circumstances] which are listed do direct inquiry both to the circumstances of the crime and to the individual culpability of the defendant, and so adequately guide the decision of the sentencing authority."

Subsequently, in State v. Osborne (1976), 49 Ohio St. 2d. 135, the court specifically addressed itself to the mitigating circumstances provision and held that provision not to be unconstitu-

tionally narrow, referring to its holding in State v. Bell (1976), 48 Ohio St. 2d. 270, which stated that relevant factors such as the defendant's age and prior criminal record are to be considered by the sentencing authority in determining the existence of mitigating circumstances. Further, the Ohio Supreme Court specifically construed and upheld R.C. 2929.04 (B)(2) relating to duress, coercion, or strong provocation, in State v. Woods (1976), 48 Ohio St. 2d. 127, and R.C. 2929.04 (B)(3), relating to psychosis or mental deficiency, in State v. Black (1976), 48 Ohio St. 2d. 262.

We find for the reasons set forth in the foregoing Ohio Supreme Court decisions, that the language of R.C. 2929.04(B) is not unconstitutionally vague. Appellant's sixth assignment of error is not well taken.

Appellant's assignment of error No. 8 is as follows:

> "VIII. THE LOWER COURT DEPRIVED THE APPELLANT OF HIS FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO OBJECT TO THE PROPRIETY OF THE SEIZURE OF HIS PERSON BY RESTRICTING THE SCOPE OF INQUIRY INTO THE QUESTION OF WHETHER PROBABLE CAUSE EXISTED FOR HIS WARRANTLESS ARREST."

The test of whether probable cause exists for a warrantless arrest is stated in Beck v. Ohio (1964), 379 U.S. 89, 91, as follows:

> "Whether that arrest was constitutionally valid depends in turn upon whether, at the mement the arrest was made, the officers had probable cuase to make it-whether at that mement the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense."

See also Bock v. Cincinnati (1931), 43 Ohio App. 257.

The record of the pre-trial hearing indicates that the appellant was informed that he was under arrest after he had come to the police station and answered questions asked by Detective Howard. Although Detective Howard intended to arrest appellant from the time he first appeared at the station, he did not do so officially until after the initial interrogation. We find that at that time the information in Detective Howard's possession, including the identification of appellant by the victim's children as a visitor to the house on the night of the murder and appellant's denial of that visit, gave him probable cause to arrest appellant without a warrant. Further, we find no violation of appellant's rights in the trial court's limitation of testimony concerning probable cause at the pre-trial hearing, since only Detective Howard himself could relate what circumstances were known to him that led him to suspect the appellant. Appellant's assignment of error No. 8 is not well taken.

Appellant's assignment of error No. 9 is as follows:

> "IX. THE TRIAL COURT ERRED IN ITS REFUSAL TO ALLOW DEFENDANT TO INQUIRE INTO THE PROCEDURES UTILIZED BY THE LUCAS COUNTY PROSECUTOR'S OFFICE IN PRESENTING THE INSTANT CASE TO THE LUCAS COUNTY GRAND JURY. THE INQUIRY WAS TO HAVE BEEN LIMITED TO AN INVESTIGATION OF THE RATIONAL BASIS, IF ANY, DISTINGUISHING THE TREATMENT OF THIS APPELLANT FROM OTHERS SIMILARLY SITUATED."

Appellant alleges that the trial court erred in refusing to allow him to inquire into the Lucas County Grand Jury proceedings in other felony murder cases. Appellant contends that such an inquiry would have shown he was deprived of his constitutional right to equal protection under the law in that the Lucas County prosecutor had advised the grand jury of its right to return specifications only in his case of all the felony murder cases prosecuted up to that time since Ohio's new criminal code had become effective on January 1, 1974. The death penalty for aggravated murder is precluded unless the

indictment or a count thereof specifies one or more of the aggravating circumstances listed in R.C. 2929.04. See R.C. 2941.14 and R.C. 2929.04.

The United States Supreme Court in Gregg v. Georgia, supra, held generally that discretionary stages prior to the sentencing stage were not unconstitutional. In his concurrence in Gregg, Justice White expanded on that view as follows:

> "Petitioner's argument that prosecutors behave in a standardless fashion and decide which cases to try as capital felonies is unsupported by any fact. Petitioner simply asserts that since prosecutors have the power not to charge capital felonies they will exercise that power in a standardless fashion. This is untenable. Absent facts to the contrary, it cannot be assumed that prosecutors will be motivated in their charging decision by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicts. Unless prosecutors are incompetent in their judgments, the standards by which they decide whether to charge a capital felony will be the same as those by which they jury will decide the questions of guilt and sentence. Thus defendants will escape the death penalty through prosecutorial charging decisions only because the offense is not sufficiently serious; or because the proof is insufficiently strong. This does not cause the system to be standardless anymore than the jury's decision to impose life imprisonment on a defendant whose crime is deemed insufficiently serious or its decision to acquit someone who is probably guilty but whose guilt is not established beyond a reasonable doubt. * * *"
> (903)

We find on the basis of the United States Supreme Court's dicta in Gregg that the exercise of prosecutorial discretion to return specifications in capital offense cases is constitutionally valid, and we further find no evidence that the prosecutor abused that discretion in the instant case. Therefore, appellant's ninth assignment of error is not well taken.

Appellant's tenth assignment of error is as follows:

> "X. THE TRIAL COURT ERRED IN REFUSING TO STRIKE THE FIRST SPECIFICATION OF EACH COUNT OF THE INDICTMENT ON THE GROUNDS THAT EACH SPECIFICATION IS PREDICATED UPON SECTION 2929.04(A)(5) PURPOSE, ALL IN VIOLATION OF THE DEFENDANT'S RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I SEC. 16 OF THE OHIO CONSTITUTION."

R.C. 2929.04(A)(5) reads as follows:

> "(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment * * * and is proved beyond a reasonable doubt:
>
> "(5) The offender has previously been convicted of an offense of which the gist was the purposeful killing of or attempt to kill another, committed prior to the offense at bar, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender."

Appellant contends that the words "an offense of which the gist was the purposeful killing of or attempt to kill another is unconstitutionally vague. We find nothing ambiguous or vague about this language. Appellant's assignment of error No. 10 is not well taken.

Appellant's eleventh assignment of error is as follows:

> "XI. THE OHIO DEATH PENALTY STATUTE VIOLATES THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS IN THAT THEY DENY THE CAPITALLY ACCUSED THE RIGHT TO A JUDGMENT OF HIS PEERS

AS TO THE EXISTENCE OF MITIGATING CIRCUMSTANCES, AND THE APPROPRI-ATENESS OF THE PENALTY OF DEATH AND THE TRIAL COURT BELOW ERRED IN DENYING DEFENDANT LONBERGER'S MOTION REQUESTING SUCH A JURY DETERMINATION."

Pursuant to R.C. 2929.03, the fact finder (either a jury or a three-judge panel) returns a verdict on the charge of aggravated murder and on any specifications of aggravating circumstances which are charged. If the defendant is found guilty of aggravated murder and of one or more specifications, there is a separate penalty proceeding conducted by the trial judge in a jury case or the same three-judge panel that convicted the defendant in a non-jury case. Following a pre-sentence investigation and psychiatric examination, and upon reports of those investigations plus any other evidence and arguments that are submitted by counsel, the sentencing authority determines whether any of the mitigating circumstances listed in R.C. 2929.04(B) exists. If the sentencing authority (either the trial judge or the three-judge panel unanimously) finds no mitigating circumstances, the defendant is sentenced to death; otherwise, he is sentenced to life imprisonment.

Appellant contends that in a case in which a jury trial is demanded, only the jury may be trusted to impose the death penalty in order to prevent excessiveness and disproportionality in capital sentencing. However, in upholding the Florida death penalty statute, under which the jury renders an advisory verdict but the trial judge actually determines the sentence, in Proffitt v. Fla. (1976), _____U.S._____, 49 L. Ed. 2d. 913, 923, the United States Supreme Court said:

> "This Court has pointed our that jury sentencing in a capital case can perform an important societal function, * * * but it has never suggested that jury sentencing is constitutionally required. And it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since

> the trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases."

On the basis of the foregoing reasoning, we find that there is no constitutional requirement tht the penalty in a capital case be determined by a jury.

Appellant further argues that findings regarding the presence or absence of mitigating circumstances are findings of fact as to which the defendant has a constitutional right to trial by jury. Appellant argues that a criminal defendant is entitled to a judgment by his peers as to the facts that significantly effect the degree of his culpability. Appellant fails to recognize tha at the sentencing stage it is not culpability that is being determined. In State v. Woods, supra at 137, the Ohio Supreme Court stated:

> "The question at that stage is not guilt, for guilt has already been determined. * * * Rather, the purpose of mitigation is to recognize that the punishment assigned for a criminal act may, for ethical and humanitarian reasons, be tempered out of consideration of the individual offender and his crime."

Pursuant to R. C. Chap. 2947, sentencing in criminal cases is a function of the court, not of the jury. It is within the discretion of the court to impose sentence or to suspend sentence and place the defendant on probation. In determining whether to suspend a sentence, the court determines on the basis of testimony and reports whether the conditions set forth in R.C. 2951.02 exist. See R.C. 2947.06 and Crim. R. 32.2. We find no constitutional infirmity in authorizing a court which routinely determines the existence of specified mitigating circumstances in noncapital cases to do the same thing in capital cases. Appellant's eleventh assignment of error is not well taken.

On consideration whereof, the court finds that the defendant was prejudiced and prevented from having a fair trial in that the the verdict of guilty of the charge of murder while committing

rape is not sustained by sufficient evidence. It is hereby ordered, adjudged, and decreed that the judgment on the verdict of guilty of aggravated murder in violation of R.C. 2903.01(B) be and hereby is reversed, and that a final judgment of guilty of murder in violation of R.C. 2903.02 be and hereby is entered.

This cause is remanded to the Lucas County Common Pleas Court for sentencing of defendant pursuant to R.C. 2929.02 (B). Costs assessed against the appellee.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Ten (10) days from the date hereof this document shall constitute the journal entry of judgment and shall be file-stamped by the Clerk of the Court of Appeals, at which time the period for review will begin to run. App. R. 22(E).

/s/ John W. Potter,
Presiding Judge

/s/ Clifford F. Brown,
Judge

/s/ Frank W. Wiley,
Judge

Judge Frank W. Wiley, Retired, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.

WILEY, J., concurs. As to assignment of error No. 4, the evidence does sustain the jury verdict that it was the defendant that had sexual intercourse with the victim, but there is reasonable doubt that it was rape.

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No. 80-1463

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

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Facility,

Petitioner,

v.

ROBERT LONBERGER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH DISTRICT

BRIEF IN OPPOSITION TO CERTIORARI

John Czarnecki, Esq.
HAYWARD, COOPER, STRAUB,
WALINSKI & CRAMER
900 Adams Street
Toledo, Ohio 43624

Norman G. Zemmelman, Esq.
BRITZ & ZEMMELMAN
340 Spitzer Building
Toledo, Ohio 43604

Counsel for Respondent

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A20) is reported at 635 F.2d 1189.

JURISDICTION

The judgment of the Court of Appeals was entered on December 1, 1980. A petition for rehearing was denied on December 30, 1980 (Pet. App. A13 - A14). The petition for a writ of certiorari was filed on February 25, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STWARD, COOPER,
TRAUB, WALINSKI
& CRAMER
LEGAL PROFESSIONAL
ASSOCIATION
[illegible] ADAMS STREET
[illegible], OHIO 43624

QUESTION PRESENTED

Whether submission of a constitutionally infirm conviction to the jury in a subsequent trial may be cured with a simple cautionary instruction.

STATEMENT

On or about February 1, 1975 respondent was charged with the offense of aggravated murder in Lucas County, Ohio. Appended to the indictment was a specification alleging that he had "previously been convicted of an offense of which the gist was the purposeful * * * attempt to kill another * * *." A finding on the specification would result in a possible imposition of the death penalty. Respondent sought to dismiss the specification on the grounds that the conviction to which it referred was based upon an involuntary plea of guilty. A full hearing was held at which defendant took the stand and denied that he had been aware of the nature of the charge to which he entered a plea. The state declined to offer testimony. The trial court denied the motion and the conviction statement (with indictment appended) was given to the jury. A conviction was returned on both the substantive offense and the specification and the death penalty was imposed. The Ohio Court of Appeals for the Sixth District determined that the State had failed to prove the offense of aggravated murder, reversed that conviction and

FWARD, COOPER,
RAUB, WALINSKI
& CRAMER
GAL PROFESSIONAL
ASSOCIATION
0 ADAMS STREET
EDO, OHIO 43624

entered a final judgment of guilty on the offense of murder. (Pet. App. A31 - A49). The Ohio Supreme Court refused to accept jurisdiction finding that the case "presented no substantial constitutional question."

The petitioner filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. 2254 which was denied by the district court. (Pet. App. A16 - A30). The United States Court of Appeals for the Sixth Circuit reversed the district court finding that the state had failed to prove, by clear and convincing evidence, that petitioner had understood the earlier charges against him and that therefore his assertion that it was not knowledgeable should have been sustained. (Pet. App. A1 - A14). Introduction of an invalid conviction in a subsequent trial was held to require reversal under the rule announced by this Court in Burgett v. Texas, 389 U.S. 109 (1967).

ARGUMENT

1. Petioner has made its argument far more complex than either the facts or the applicable law warrant. To suggest that this case "presents an important issue of constitutional law regarding the scope and vitality of this Court's decision in Spencer v. Texas, 385 U.S. 554 (1967)" is to ignore a critical distinction between the two cases, a distinction raised, and decided, in Burgett v. Texas, 389 U.S. 109 (1967).

TYWARD, COOPER,
TRAUB, WALINSKI
& CRAMER
LEGAL PROFESSIONAL
ASSOCIATION
ADAMS STREET
LEDO, OHIO 43624

In Spencer, the Court decided that the state had a legitimate interest in allowing the introduction of prior valid convictions to enhance the penalty for a subsequent offense, assuming, of course, a proper cautionary instruction to the jury.

Within nine months after deciding Spencer, the Court was confronted with Burgett, another Texas case, in which the jury had been advised of prior convictions which were constitutionally infirm.

Even though the defendant in Burgett had not suffered an enhanced penalty and the jury had been admonished not to consider the prior crimes as evidence of guilt in the case at bar, the conviction was reversed. Although, as the Court noted, it does not "sit as a court of criminal appeals to review state cases," it will review state rules of evidence which act to abridge individual constitutional guarantees. Coerced confessions, illegally seized evidence, denial of the right of confrontation and, as in Burgett itself, denial of the right to counsel would all impel the Court to interject itself in state criminal proceedings.

Petitioner herein seeks to denigrate the ruling below by characterizing it as a "highly prophylactic on the record rule with respect to the validity of a guilty plea." He would have the Court limit the effect of Burgett to prior convictions secured in violation of some "specific" 1/ constitutional guarantee.

1/ Petitioner fails to enumerate those guarantees which fit his definition of "specificity."

SAYWARD, COOPER, STRAUB, WALINSKI & CRAMER
A LEGAL PROFESSIONAL ASSOCIATION
ONE ADAMS STREET
TOLEDO, OHIO 43624

This case is not one that presents a simple formal failure of the requirements of Rule 11, F.R.Cr.P. Respondent denies that he was ever advised of the charge to which he was entering a plea. The transcript of the 1972 proceedings in Chicago support his assertion and the Ohio prosecutor produced no extrinsic evidence from which a contrary finding could be made. It is difficult to conceive of a more specific and fundamental right than to be apprised of the charge to which a plea is being entered. It has been held that unless the defendant received full notice of the notice of the charge against him, he has been deprived of the "first and most universally recognized requirement of due process". Smith v. O'Grady, 312 U.S. 329 (1940).

The court of appeals quite properly refused to allow a conviction so secured to work a further deprivation of the respondents' rights by allowing the state to introduce it in a subsequent criminal prosecution, with or without a cautionary instruction.

2. The petitioner contends that the court of appeals should have remanded the matter to the district court for an evidentiary hearing, citing Roddy v. Black, 516 F.2d 1380 (6th Cir. 1975).

Roddy was a case involving the initial attack upon the voluntariness of a plea entered in a state court. Brought under 28 U.S.C. 2254, the district court quite properly conducted an evidentiary hearing to allow the state an opportunity

HAYWARD, COOPER, STRAUB, WALINSKI & CRAMER
A LEGAL PROFESSIONAL ASSOCIATION
ADAMS STREET
TOLEDO, OHIO 43624

to clarify and explain an inadequate record.

In the instant case, however, the district court (and subsequently, the court of appeals) were simply reviewing the record of what should have been a full and complete hearing conducted in the Ohio trial court. The respondent expressly raised the legitimacy of the earlier plea and conviction with a motion to dismiss the specification. The trial court held an evidentiary hearing at which the state was given an opportunity to present whatever evidence it had on the issue. It is simply untrue to assert, as the petitioner has, that "[T]he extent to which petitioner had actual notice and understanding * * * is not of record due to the refusal of the circuit court to remand for an evidentiary hearing." [Emphasis in original]. (Pet. 13, n.6). The respondent testified that he had never been apprised of the fact that he was entering a plea of guilty to the charge of attempted murder. The state had a full opportunity to show the extent of respondent's "notice and understanding" and presented not a scintilla of evidence. Respondent should not be required to relitigate issues simply because the state is later found to have failed to bear its burden of proof upon having been given an opportunity to do so.

TWARD, COOPER,
RAUB, WALINSKI
& CRAMER
PROFESSIONAL
ASSOCIATION
ADAMS STREET
ATEO, OHIO 43824

CONCLUSION

This case falls squarely within the explicit mandate of the Court in Burgett v. Texas, 389 U.S. 109 (1967). The petition for a writ of certiorari should be denied.

Respectfully submitted,

John Czarnecki, Esq.
HAYWARD, COOPER, STRAUB,
WALINSKI & CRAMER
900 Adams Street
Toledo, Ohio 43624

Norman G. Zemmelman, Esq.
BRITZ & ZEMMELMAN
340 Spitzer Building
Toledo, Ohio 43604

MARCH 1981

HAYWARD, COOPER,
STRAUB, WALINSKI
& CRAMER
A LEGAL PROFESSIONAL
ASSOCIATION
900 ADAMS STREET
TOLEDO, OHIO 43624

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Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The respondent, Robert Lonberger, who is now held in the Columbus Correctional Facility at Columbus, Ohio, asks leave to file the attached Brief in Oppostion to Certiorari to the United States Court of Appeals for the Sixth Circuit without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53.

Respondent has been previously determined to be indigent and has proceeded in both the District Court and the Court of Appeals in forma pauperis pursuant to the provisions of the Criminal Justice Act of 1964.

John Czarnecki
Counsel for Respondent
Robert Lonberger

MAYWARD COOPER
STRAUB WALINSKI
& CRAMER
A LEGAL PROFESSIONAL
ASSOCIATION
400 ADAMS STREET
TOLEDO, OHIO 43604

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CERTIFICATE OF SERVICE

The undersigned, John Czarnecki, Counsel for the Respondent, Robert Lonberger, hereby certifies that two copies of the attached Brief in Opposition were sent, by ordinary U.S. Mail, to Richard David Drake, Office of the Ohio Attorney General, State Office Tower, 30 East Broad Street, Columbus, Ohio 43215 on this 18th day of March, 1981.

John Czarnecki

John Czarnecki
HAYWARD, COOPER, STRAUB,
WALINSKI & CRAMER
900 Adams Street
Toledo, Ohio 43624

Counsel for Respondent

HAYWARD, COOPER,
STRAUB, WALINSKI
& CRAMER
A LEGAL PROFESSIONAL
ASSOCIATION
900 ADAMS STREET
TOLEDO, OHIO 43624